TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 193.

EBEN PIERCE, PLAINTIFF IN ERROR,

vs.

JAMES A. FRACE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

FILED JUNE 9, 1891.

(14,678.)

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[Seal of the Supreme Court, State of Washington]

a In the Supreme Court of the State of Washington for the County of Pierce.

EBEN PIERCE, Plaintiff,
vs.
JAMES A. FRACE, Defendant.

1 In the Second Judicial District Court of Washington Territory in and for Pierce County.

EBEN PIERCE
vs.
JAMES A. FRACE.

Now comes the above-named plaintiff, Eben Pierce, and complains of the defendant, James A Frace, and for his cause of action alleges:

I.

That all the times hereinafter mentioned plaintiff was the owner and was in the possession and was entitled to the possession of all that certain tract or parcel of real estate situate, lying, and being in Pierce county, Washington Territory, and described as follows, to wit: The north half of the southwest quarter and the south half of the northwest quarter of section two (2), township twenty (20) north, range two east, containing 160 acres.

II.

That while plaintiff was so seized and in possession of said lands the defendant, on the — day of November, 1888, and without right or title, entered into the possession of the demanded premises and ousted and ejected plaintiff therefrom, and now unlawfully withholds the possession thereof from plaintiff, to his damage in the sum of one thousand dollars.

2 III.

That the value of the rents, issues, and profits of said premises from the said day of November, 1888, and while the plaintiff has been excluded therefrom by the defendant is one thousand dollars.

Wherefore the plaintiff prays judgment against the defendant:

1. For the recovery of the possession of the demanded premises, and for the sum of one thousand dollars damages for withholding the possession thereof.

2. For the sum of one thousand dollars, the value of the said rents, issues, and profits and costs of suit.

STILES & STEVENS,
Att'ys for Plaintiff.

TERRITORY OF WASHINGTON, } ss:
County of Pierce, }

Eben Pierce, having been first duly sworn, on oath says that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and he believes the same to be true.

EBEN PIERCE.

Subscribed and sworn to before me this 17th day of Sept., 1889.
[SEAL.] C. E. CLAYPOOL,
Notary Public, Pierce County, Washington.

Complaint.
Filed Sept. 18, 1889.

A. REEVES AYRES, *Clerk.*

3 In the District Court of the Second Judicial District of Washington Territory, Holding Terms at Tacoma.

EBEN PIERCE, Plaintiff, }
vs.
JAMES A. FRACE, Defendant. }

Comes now James A. Frace, and for answer to plaintiff's complaint filed herein he alleges as follows, to wit:

I.

He denies each and every allegation contained in plaintiff's complaint.

For further answer and by way of equitable defense, the defendant alleges:

I.

That on the 20th day of December, A. D. 1880, the land described in plaintiff's complaint was unoccupied and unappropriated public land of the United States, and that on said day plaintiff herein filed his declaratory statement for said land under the preemption laws of the United States.

II.

That on the 13th day of February, 1883, plaintiff herein made his final proof, and that on the 12th day of March, 1883, plaintiff's said cash entry was allowed by the register and receiver of the land office at Olympia.

4 III.

That thereafter and on the 7th day of August, 1883, the defendant herein filed in the office of the Commissioner of the Land Office and afterwards with the register and receiver his corroborated affidavit, in which he alleges that plaintiff had at no time established his residence on said land; that he failed to improve and cultivate

the same as required by law, and that the said cash entry had been procured by fraud.

IV.

That thereafter and on the 16th of May, 1885, the Commissioner of the General Land Office ordered a hearing to be had touching the charges so made by defendant in said affidavits before the register and receiver at Olympia, and that, in pursuance of said order so made, plaintiff and defendant appeared in person and by counsel before the register and receiver at Olympia on the 13th day of July, 1885, for the trial of the questions so raised and presented by the affidavits so filed as aforesaid by this defendant.

V.

That said parties being present and ready with their witnesses, the evidence was all submitted and the cause fully argued by counsel, and after said argument the said register and receiver duly found as facts—

That plaintiff herein at no time established his residence on the land embraced in his said cash entry.

That he failed to cultivate and improve said land as required by law.

And, as a conclusion of law, held that plaintiff's said cash entry should be cancelled.

VI.

That thereafter and within the time required by law plaintiff herein took an appeal from said decision so made as aforesaid to the Commissioner of the General Land Office, and that on the 3rd day of June, 1886, the Commissioner of the General Land Office duly affirmed the aforesaid decision of the register and receiver and ordered plaintiff's said cash entry to be cancelled.

VII.

That thereafter plaintiff herein took an appeal from the said decision of the Commissioner to the Secretary of the Interior, and that on the 31st day of March, 1888, the said Secretary of the Interior duly affirmed the said decision of the Commissioner of the General Land Office and thereafter duly cancelled plaintiff's said cash entry.

VIII.

That thereafter this defendant filed upon said tract of land under the homestead laws of the United States, made his final proof thereon, and paid to the Government of the United States the Government price for said land, and thereafter, on the 26th day of July, 1889, received from the receiver of the United States Land Office his patent certificate for the land described in plaintiff's complaint, by virtue whereof the defendant is the owner of said land and entitled to the possession of the same.

JUDSON, SHARPSTEIN & SULLIVAN,
Attorneys for Defendant.

6 TERRITORY OF WASHINGTON, } ss.
County of Pierce, }

James A. Frace, being duly sworn, on oath says that he is the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that he believes it to be true.

JAMES A. FRACE.

Subscribed and sworn to before me this 28th day of September, A. D. 1889.

JNO. W. T. LEUBBER,
Notary Public.

[SEAL.]

Service by receipt of a copy admitted at Tacoma this 28th day of September, A. D. 1889.

STILES & STEVENS,
Attorneys for Pl'ffs.

Filed September 28th, 1889.

A. REEVES AYRES, *Clerk.*

No. 2994.

7 In the District Court of the Second Judicial District of Washington Territory, Holding Terms at Tacoma in and for Pierce County.

EBEN PIERCE, Plaintiff, }
vs. } Amended Reply.
JAMES A. FRACE, Defendant. }

Now comes the plaintiff in the above-entitled cause and, by leave of the court first obtained herein, files his amended reply to the answer of the defendant as follows:

I.

He says that the said alleged filing of an affidavit by the defendant in the office of the Commissioner of the General Land Office was without authority of law and was void, and the said alleged proceedings had and taken thereon by the said Commissioner and the register and receiver and the Secretary of the Interior were each and all wholly void for the reason that neither of the said officers had any jurisdiction whatever over the said land or of this plaintiff; and he further says that the said alleged cancellation of plaintiff's entry of said land, and the said alleged filing of a declaratory statement thereon by the defendant, and his said alleged final proof thereon, and the said alleged issuance to the defendant of a receiver's receipt or patent certificate by the receiver of the United States Land Office for the said land were each and — void acts and gave the defendant no right, title to, or interest in said land or

8 any part thereof, for the reason that the United States long theretofore had sold and disposed of said land to this plain-

tiff and had received from plaintiff the sum of four hundred dollars ($400.00), in consideration of which sum the said United States had undertaken and agreed with this plaintiff to execute and deliver to plaintiff a patent for said land; all of which was well known to the defendant at all the times mentioned in said answer.

II.

And plaintiff further says that prior to February 13th, 1883, in accordance with the pre-emption laws of the United States and the regulations of the General Land Office, he caused a notice of his intention to make final proof on said date to be published for thirty days in a newspaper, and on said date he appeared with his witnesses before the said register and receiver at Olympia and made his final proof and paid to said register and receiver the proper land office fees and the sum of four hundred dollars ($400.00), which was the legal price of said land; and thereafter and on or about the 12th day of March, 1883, the said register and receiver accepted said final proof as sufficient and received said sum of four hundred dollars ($400.00), and executed and delivered to this plaintiff the duplicate receiver's receipt therefor, and thereupon plaintiff became entitled to have and receive from the United States, in the due course of the administration of the General Land Office,
9 a patent for said land, and no lawful proceedings have ever been taken by the United States to rescind the contract so entered into between the United States and the plaintiff for the conveyance of said land by the execution and delivery of said patent, nor has said sum of four hundred ($400.00) or any part thereof ever been repaid or tendered to plaintiff by the United States, and plaintiff, as an entryman of said land as aforesaid, was the owner thereof and was in the possession and was entitled to be in possession of the same at the date of defendant's said entry and at all other times since said 13th day of March, 1883.

III.

He denies that the said Frace in his said alleged affidavit alleged that this plaintiff failed to improve and cultivate said land as required by law, or that the said entry of plaintiff had been procured by fraud.

IV.

He denies that the said decision of the Commissioner of the General Land Office was affirmed by the Secretary of the Interior, except as to the finding of the register and receiver and Commissioner that plaintiff had not made his residence upon said land, and denies that said defendant afterwards or at all filed his corroborated affidavit with the register or receiver or any affidavit whatsoever.

STILES & STEVENS,
Plaintiff's Attorney.

10 TERRITORY OF WASHINGTON, } ss:
County of Pierce, }

Eben Pierce, having been first duly sworn, on oath says that he is the plaintiff in the above-entitled action; that he has read the foregoing amended reply and knows the contents thereof, and he believes the same to be true.

EBEN PIERCE.

Subscribed and sworn to before me this 7th day of November, 1889.

[SEAL.] J. G. COMPTON,
Notary Public, Pierce County, Washington.

Amended reply.
Filed Nov. 27, 1889.

W. H. FLETCHER, *Clerk.*

11 In the Superior Court of the State of Washington in and for the County of Pierce, Late in the District Court of the Second Judicial District of Washington Territory, Holding Terms at Tacoma in and for Pierce County.

EBEN PIERCE, Plaintiff, }
vs.
JAMES A. FRACE, Defendant. }

The defendant in the above-entitled action demurs to the amended reply of the plaintiff herein and assigns as ground of demurrer that said amended reply does not contain facts sufficient to constitute a defense to the affirmative matter set up in defendant's answer.

JUDSON, SHARPSTEIN & SULLIVAN,
Attorneys for Defendant.

Service by receipt of a copy admitted at Tacoma this 22nd day of November, A. D. 1889.

DOOLITTLE, PRITCHARD & STEVENS,
Attorneys for Pl'ff.

Filed Nov. 29, 1889.

W. H. FLETCHER, *Clerk.*

12 In the Superior Court of the State of Washington in and for the County of Pierce.

EBEN PIERCE, Plaintiff, }
vs.
JAMES A. FRACE, Defendant. }

This cause came on to be heard on the second day of December, 1889, upon the demurrer of defendant to the new matter contained in the amended reply of plaintiff. Both parties were represented by their respective counsel, and, after argument, the cause was submitted to the court for decision; and now, on the eleventh day of

December, 1889, the court, having duly considered the law and the premises, does order that said demurrer be sustained; to which ruling of the court plaintiff, by his counsel, duly excepts; which exception is allowed, and plaintiff is granted ten days from this date within which to serve and file herein a further amended reply.

Filed Dec. 12, 1889, p. 592, J. 8.

W. H. FLETCHER, *Clerk.*

13 In the Superior Court of the State of Washington in and for the County of Pierce.

EBEN PIERCE Plaintiff,
vs.
JAMES A. FRACE, Defendant.

This cause having been heretofore heard upon the demurrer of defendant to the new matter contained in the amended reply of plaintiff, and the court having on the eleventh day of December, 1889, sustained said demurrer, to which ruling the plaintiff did then and there except, and the court having then and there granted plaintiff ten days' time within which to serve and file a further amended reply to said answer, and said time having expired, and now, on this 29th day of January, 1890, both parties being present in court by their counsel, the defendant, by his counsel, Messrs. Judson, Sharp-tein & Sullivan, moves the court that the default of the plaintiff be entered and for judgment against said plaintiff for a dismissal of said action and for the costs and disbursements of the action; and thereupon the said plaintiff, by his attorneys, Messrs. Doolittle, Pritchard & Stevens, announce that they do not desire to plead further in said action, but elect to stand upon the pleadings as heretofore filed herein; whereupon, all matters being by the court now here seen, heard, and considered and fully understood—

It is ordered, adjudged, and considered that this action be
14 dismissed, and that defendant do have and recover of plaintiff herein his costs and disbursements herein, taxed at $8—, and that execution do issue therefor; to which order and judgment the plaintiff at the time excepted and his exceptions were allowed.

FRANK ALLYN, *J.*

Filed Jan. 29, 1890.

W. H. FLETCHER, *Clerk.*

Page 122, J. 9.

In the Superior Court in and for the State of Washington, Holding ing Terms in the County of Pierce, Heretofore Known as the District Court in and for the Second Judicial District of the Territory of Washington, Holding Terms at Tacoma in and for the County of Pierce.

EBEN PIERCE, Plaintiff,
vs.
JAMES A. FRACE, Defendant. } Notice of Appeal.

To the above-named defendant, James A. Frace, and Judson, Sharpstein & Sullivan:

You and each of you are hereby notified that the plaintiff, Eben Pierce, above named, hereby appeals to the supreme court of the State of Washington from the judgment rendered in the above-entitled action in favor of the said defendant against the said plaintiff for the sum of 23.40 dollars costs on the 29th day of January, 1890.

This appeal is taken from the whole and every part of the said judgment.

DOOLITTLE, PRITCHARD & STEVENS,
Attorneys for Plaintiff.

15 STATE OF WASHINGTON, }
County of Pierce, } *ss:*

I hereby acknowledge due and legal service of the within notice of appeal at Tacoma, county of Pierce, Washington, this 18th day of Feb., A. D. 1890.

JUDSON, SHARPSTEIN & SULLIVAN,
Attorneys for Def't.

Filed February 18th, 1890.

W. H. FLETCHER, *Clerk.*

In the Superior Court in and for the State of Washington, Holding Terms in the County of Pierce, Heretofore Known as the District Court in and for the Second Judicial District, Holding Terms at Tacoma in and for the County of Pierce.

EBEN PIERCE, Plaintiff,
vs.
JAMES A. FRACE, Defendant. } Order of Appeal.

Now, on this day, come the parties in the above-entitled action, and thereupon the plaintiff above named gave notice in open court that he appeals to the supreme court of the State of Washington from the final judgment herein, made and entered in favor of the said defendant and against the said plaintiff on the 29th day of January, 1890, for the dismissal of said action and for the sum of twenty-three and $\frac{40}{100}$ dollars costs, and that the said appeal is taken from the whole and every part of the said judgment.

It is therefore ordered by the court that the said notice of appeal be, and the same is hereby, entered of record in this court.

Done in open court this 18th day of Feb., 1890.

FRANK ALLYN, *Judge.*

Filed Feb. 18th, 1890.

W. H. FLETCHER, *Clerk.*

16 In the Superior Court in and for the State of Washington, Holding Terms in the County of Pierce, Heretofore Known as the District Court in and for the Second Judicial District of the Territory of Washington, Holding Terms at Tacoma in and for the County of Pierce.

EBEN PIERCE, Plaintiff,
vs.
JAMES A. FRACE, Defendant. } Assignment of Errors.

Now comes the plaintiff in the above-entitled cause and assigns the following errors upon which he relies on his appeal to the supreme court herein, viz:

First. That the said superior court erred in sustaining the demurrer of the defendant to the reply of the plaintiff herein.

Second. That the superior court erred in rendering judgment in favor of the defendant for the dismissal of said action and for costs herein.

Third. That the judgment in the above-entitled cause ought to have been given in favor of the plaintiff, as prayed for in the complaint, and the court erred in rendering any judgment in favor of the defendant.

DOOLITTLE, PRITCHARD & STEVENS,
Attorneys for Appellant.

Filed Feb'y 20th, 1890.

STATE OF WASHINGTON, } ss:
County of Pierce, }

I hereby acknowledge service of the within assignment of errors at Tacoma, county of Pierce, Washington, this 19th day of February, A. D. 1890.

JUDSON, SHARPSTEIN & SULLIVAN,
Attorneys for Defendant.

17 STATE OF WASHINGTON, } ss:
County of Pierce, }

I, W. H. Fletcher, clerk of the superior court *court* of the State of Washington for the county of Pierce, do hereby certify that the foregoing is a full, true, and correct transcript of so much of the record in the above-entitled cause as I am by statute required and by appellant requested on appeal to transmit to the supreme court.

In testimony whereof I have hereunto set my hand and
[SEAL.] the seal of said superior court this twelfth day of April, A. D. 1890.

W. H. FLETCHER, *Clerk.*

Filed May 26, 1890.
SOL. SMITH, *Clerk.*

18 In the Supreme Court of the State of Washington.

EBEN PIERCE, Plaintiff in Error,
vs.
JAMES A. FRACE, Defendant in Error. } Motion to Remove to United States Court.

Now comes the plaintiff, Eben Pierce, and shows to the court that the above-entitled action was commenced prior to the date of the admission into the Union of the State of Washington, and that at the time of such admission this above-entitled action was pending; that the said action arose within the limits of the said State of Washington, whereof the United States circuit court for the State of Washington has jurisdiction, and that the said action is one of which said circuit court of the United States might and would have had jurisdiction under the laws of the United States had such court existed at the time of the commencement of said action; that the matter in dispute in said above-entitled action and for which the same was brought exceeds in value the sum of two thousand dollars, exclusive of costs, and that the matter in dispute in such action arises under the laws of the United States, and the decision thereof depends wholly upon and must be decided entirely upon a construction of the statutes of the United States; and the said Eben Pierce now makes and files his written request in this court
19 in pursuence of that act of the Congress of the United States generally known as the enabling act and entitled An act to provide for the devision of Dakota into two States and to enable the people of North Dakota, South Dakota, and Washington to form constitutions and State governments and to be admitted into the Union on equal footing with the original States, and to make donations of public lands to said States, approved February 22nd, 1889, and, in pursuance of said act, now and hereby requests and moves this court to transfer and remove this case to the circuit court of the United States for the district of the State of Washington upon the grounds hereinbefore set forth, all of which are more fully shown by the records of this action.

—— ——,
By —— ——,
His Attorneys.

20 STATE OF WASHINGTON, } ss:
County of Pierce, }

I, W. H. Pritchard, being duly sworn, depose and say—
That I am the attorney of the plaintiff in the above-entitled action.

That I have read the foregoing written request for the removal of said action to the United States circuit court, and that the matters and things therein contained are true of my own knowledge.

W. H. PRITCHARD.

Subscribed and sworn to before me this 23rd day of May, 1890.

[SEAL.] G. D. STEVENS,
Notary Public.

STATE OF WASHINGTON, }
County of Pierce, } *ss:*

I hereby acknowledge due and legal service of the within motion at Tacoma, county of Pierce, Washington, this 23rd day of May, 1890.

JUDSON, SHARPSTEIN & SULLIVAN,
Attorney- for Def't in Error.

Filed May 26, 1890.
SOL. SMITH, *Clerk.*

21 In the Supreme Court of the State of Washington.

EBEN PIERCE }
vs. } No. 64.
JAMES A. FRACE. }

GEORGE F. ORCHARD }
vs. } No. 65.
WM. ALEXANDER. }

It is hereby agreed and stipulated that the motion to remove each of the above causes may be heard in the supreme court on Wednesday, May 28th, 1890, or as soon thereafter as counsel can be heard; and in the event that said motion should be overruled, then said cause may immediately thereafter be heard upon its merits without further notice to either party.

JUDSON, SHARPSTEIN & SULLIVAN,
Att'ys for Def't in Error.
DOOLITTLE, PRITCHARD & STEVENS,
Att'ys for Plaintiffs in Error.

Filed May 27, 1890.
SOL. SMITH, *Clerk.*

22 In the Supreme Court of the State of Washington, May 28, 1890.

EBEN PIERCE, Appellant, }
vs. } 64.
JAMES A. FRACE, Appellee. }

And now, this cause coming on for hearing upon petition of appellant for removal of this cause to the United States district court,

and after argument of counsel, and the court being fully advised in the premises and having fully considered the same, it is ordered that said petition be, and the same is, denied.

Entered, page 139, vol. 1, of Record.

In the Supreme Court of the State of Washington, Friday, October 24, 1890.

EBEN PIERCE, Appellant, vs. JAMES A. FRACE, Appellee. } 64.

And now this cause, coming on for hearing upon the transcript of the record of the superior court of the county of Pierce, Messrs. Doolittle, Pritchard & Stevens appearing of counsel for appellant and Messrs. Judson, Sharpstein & Sullivan appearing of counsel for appellee, was duly argued and submitted by counsel and taken under advisement by the court.

Entered, page 177, vol. 1, Record.

23

PIERCE vs. FRACE. } No. 64.

Opinion.

Filed February 11, 1891.

HOYT, *J.*:

Plaintiff in error filed his complaint in ejectment, and sought to recover possession of certain land therein described. Defendant in error answered, denying the allegations of the complaint, and alleging as an equitable defense facts substantially as follows: "On December 20, 1880, the plaintiff in error filed his declaratory statement for the premises in controversy under the pre-emption laws of the United States. On February 13, 1883, he made final proof to the satisfaction of the register and receiver of the United States land office at Olympia, and on March 12, 1883, his cash entry was allowed by the register and receiver, and a final receipt issued to him; that on August 7, 1883, and while the final proof of plaintiff in error was in the hands of the Commissioner of the General Land Office, the defendant in error filed with said Commissioner his corroborated affidavit, in which he alleged that plaintiff in error had 'at no time established his residence on said land, and that he had failed to improve and cultivate the same as required by law, and that the said cash entry had been procured by fraud.' The Commissioner on the 16th day of May, 1885, suspended the entry, and ordered a hearing to be had before the register and receiver, touching the charges made by defendant in error in said affidavits. On July 13, 1885, said hearing was had, at which plaintiff in error appeared with his witnesses, as did also the defendant in error. The evidence was taken, and after argument the register and receiver

found that plaintiff in error 'at no time established his residence on the land embraced in his said cash entry; that he failed to cultivate and improve said land as required by law;' and they, therefore, advised that said cash entry be canceled. Plaintiff in error thereupon took an appeal from the decision of the register and receiver to the Commissioner of the General Land Office, and on June 3, 1886, the Commissioner affirmed said decision, and ordered plaintiff in error's cash entry to be cancelled. Again plaintiff in error took an appeal, this time to the Secretary of the Interior, and on March 31, 1888, the Secretary affirmed the decision of the Commissioner of the General Land Office, and thereafter canceled said plaintiff's cash entry. Subsequently the defendant in error filed upon said premises embraced in said cash entry under the homestead laws of the United States, and thereafter made his final proof, and received from the register and receiver of the Land Office his patent certificate for said premises." To this answer plaintiff in error filed a reply, in which he asserted that the proceedings of the Land Office after the 12th day of March, 1883, the date on which his certificate was issued, " were wholly void, for the reason that said officers had no jurisdiction whatever over the said land or the plaintiff in error," and denied that the defendant in error, in the affidavit filed by him with the Commissioner of the General Land Office, alleged that the plaintiff in error failed to improve and cultivate said land as required by law, or that said entry of plaintiff in error had been procured by fraud. He further denied that the decision of the Commissioner of the General Land Office was affirmed by the Secretary of the Interior, except as to the findings of the register and receiver and Commissioner that plaintiff in error had not made his residence upon said land. Defendant in error demurred to this reply, and the ruling of the court sustaining said demurrer is relied upon as cause for the reversal of the judgment rendered thereon.

Upon this record two questions have been argued: First. Had the court jurisdiction of the subject-matter of the action? Second. Had the officers of the Land Department jurisdiction to cancel the entry of plaintiff in error?

The first proposition is so largely dependent on the latter that it is necessary only to say that, if the final receipt was in force and uncanceled, it would, under the laws of this State, authorize the holder to maintain an action for the protection of his possession thereunder. The authorities cited are to the effect that the courts will not take jurisdiction to detemine the title of adverse claimants to land until the Land Department is through with it, and the legal title has passed from the Government, and are not applicable to a case like the one at bar, where the right of possession under the laws of the State is alone in question. It is true that the language of the court in the case of Hays *v.* Parker, 2 Wash. T., 198; 3 Pac. Rep., 901, seems to warrant the contention of defendant in error; but the language used must be interpreted in the light of the facts of the case, and, thus interpreted, is not inconsistent with the above-stated conclusions; for though that was an action of ejectment, and the plaintiff relied upon a final receipt as in this case, yet it appeared

who, by their careless or corrupt administration of the trust reposed in them, might to a great extent nullify the policy of the Government as to the disposal of its lands to actual settlers and improvers only. That a policy that Congress had, and since has, taken such pains to establish and carry out should be left at the mercy of such inferior and remote officers does not seem reasonable. The opportunities for evasions of such policy are very great, even under the most careful supervision of the highest officers of the Government; and without such supervision there would be little practical utility in all the laws enacted by Congress upon that subject. The language of the section in question is susceptible of the interpretation claimed for it by plaintiff in error, but when viewed in the light of other statute law and public policy, we cannot believe that such was the intention of Congress.

The adjudicated cases upon this subject are quite numerous, and, though there may be found in some of them expressions which seem to give force to the claim of plaintiff in error, yet we think that, when examined in the light of the facts of each particular case, they will be found to better harmonize with the contention of defendant in error. In fact, after a somewhat exhaustive research, we have been unable to find any case that fully supported the plaintiff in error's contention, or that could not be harmonized with the positions of the defendant in error, except two cases in the circuit court of the United States for the district of Oregon: Smith *v.* Ewing, 11 Sawy., 56; 23 Fed. Rep., 741; Wilson *v.* Fine, 40 Fed. Rep., 52. The long experience and great reputation for learning and ability of the judge who tried those cases is well known, and they on that account are entitled to great consideration and weight. The court which rendered these opinions was, however, an inferior one, whose decisions were subject to reversal on appeal, and its judgments are not entitled to the same weight as courts of last resort. The opinions in said cases, however, show that the most painstaking research was brought to the aid of the court in the decision thereof, and the argument therein is very strong; and did we not think that they stand alone, while on the other hand are a large number of cases tending more or less strongly in an opposite direction, we should perhaps be content to accept the argument of the learned judge who decided them, and sustain the contention of the plaintiff in error; but in the light of such other cases we are led to the belief that said decisions were founded too much upon the language of the particular sections in controversy, and that due weight was not given to other portions of the statutes relating to the disposition of public lands. We shall not attempt a review of the cases cited from the State reports, as their number is too great to make a careful review of them all practicable. Besides, this is a purely Federal question, and, so far as the Supreme Court of the United States has spoken, their decision must be taken as final. Cases more or less conclusive upon the subject-matter under discussion have been from time to time decided by the Supreme Court of the United States, and to these we must mainly look for guidance. And, first, we may say generally that a large number of cases cited by plaintiff in error passed upon the

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We shall now briefly examine a few of the cases decided by the Supreme Court of the United States bearing upon this question. The case of Wilcox *v.* Jackson, 13 Pet., 498, is much relied upon by plaintiff in error. In its opinion in that case the court says: "Even assuming that the decision of the register and receiver, in the absence of fraud, would be conclusive as to the facts of the applicant then being in possession, and his cultivation during the preceding year, because these questions are directly submitted to them, yet if they undertake to grant pre-emptions in land in which the law declares they shall not be granted, then they are acting upon a subject-matter clearly not within their jurisdiction;" which language is far from conclusive, as, instead of indicating that the court had actually determined the law as thus stated, it clearly shows that it was only an admission by way of argument. It is but fair to say, however, that the above-quoted language, when taken in connection with the context and of the reference therein made to the case of Elliott *v.* Peirsol, 1 Pet., 340, very strongly supports the contention of plaintiff in error, and, if the statute law upon the subject was the same now as when that decision was rendered, might well be cited as nearly conclusive of the question. Such, however, is not the case, for not only has the law been materially changed, but the law as thus changed has received an interpretation by the same court which, as we shall see hereafter, has destroyed the force of the case under consideration. The case of Lytle *v.* State, 9 How., 314, is a still stronger one, and, were it not qualified by the statement just made, might well conclude our inquiry; for Justice McLean, in the course of his opinion, says that the findings of the register and receiver are final. These cases are entitled to but little weight in determining the proper practice under the

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law as it now stands. At the time the proceedings passed upon therein were had, the law provided that the fact of settlement and cultivation should be proved to the satisfaction of the register and receiver, from whom no appeal was given, and over whose acts, in that regard, no control was given by the higher officers of the Land Department. At the time the proceedings were had, which are under review in the case at bar, the law, as we have seen, was very different. At this time the entire responsibility as to the control and disposition of the public lands had been cast upon the Commissioner of the General Land Office; and the effect of all these provisions would seem to be sufficient to change the ruling of the court, as above set forth; and as we read the cases, such has been their effect. In deciding the case of Barnard's Heirs *v.* Ashley's Heirs, 18 How., 43, Mr. Justice Catron uses the following language: "In cases arising under the pre-emption laws of the 29th of May, 1830, and of the 19th of June, 1834, the power of ascertaining and deciding on the facts which entitle a party to the right of pre-emption was vested in the register and receiver of the land district in which the land was situated, from whose decision there was no direct appeal to higher authority." But, even under these laws, the proof on which the claim was to rest was to be made agreeably to the rules to be prescribed by the Commissioner of the General Land Office; and, if not so made, the entry would be suspended, when the proceeding was brought before the Commissioner by an opposing claimant. In cases, however, like the one before us, where an entry had been allowed on *ex parte* affidavits, which were impeached, and the land claimed by another, founded upon an opposing entry, the course pursued at the General Land Office was to return the proofs and allegations, in opposition to the entry, to the district office, with instructions to call all the parties before the register and receiver, with a view of instituting an inquiry into the matters charged; allowing each party, on due notice, an opportunity of cross-examining the witnesses of the other, each being allowed to introduce proofs; and, on the close of the investigation, the register and receiver were instructed to report the proceeding to the General Land Office, with their opinion as to the effect of the proof, and the case made by the additional testimony; and on this return the Commissioner does in fact exercise a supervision over the acts of the register and receiver. This power of revision is exercised by virtue of the act of July 4, 1836, § 1, which provides 'that, from and after the passage of this act, the executive duties now prescribed, or which may hereafter be prescribed, by law, appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and also such as relate to private claims of land and the issuing of patents for all grants of land under the authority of the Government of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States.' The necessity of 'supervision and control,' vested in the Commissioner, acting under the direction of the President, is too manifest to require comment, further than to say that

the facts found in this record show that nothing is more easily done than apparently to establish, by *ex parte* affidavits, cultivation, possession of particular quarter sections of land, when the fact is untrue. That the act of 1836 modifies the powers of registers and receivers to the extent of the Commissioner's action in the instances before us, we hold to be true. But if the construction of the act of 1836 to this effect were doubtful, the practice under it for nearly twenty years could not be disturbed without manifest impropriety;" which language, we think, directly approves of the course pursued by the Land Department in the case at bar; for though it is true that in that case the contestant claimed an interest in the land at the time of the institution of the contest, yet that fact could not affect the question, as, without any appeal having been taken to the Commissioner, he reversed the findings of the register and receiver, and ordered another hearing before them. Had the court said only as above quoted, it would be reasonably clear that the cases of Wilcox *v.* Jackson and Lytle *v.* State, *supra*, were not applicable after the passage of the act of 1836; but we are not left in doubt upon this question, as the court in the case under review proceeded further to say: "The case relied on of Wilcox *v.* Jackson, 13 Pet., 511, was an ejectment suit, commenced in February, 1836; and as to the acts of the register and receiver, in allowing the entry in that case, the Commissioner had no power or supervision, such as was given to him by the act of July 4, 1836, after the cause was in court. In the next case (9 How., 333) all the controverted facts on which both sides relied had transpired, and were concluded before the act of July 4, 1836, was passed; and therefore its construction, as regards the Commissioner's powers under the act of 1836 was not involved; whereas, in the case under consideration, the additional proceedings were had before the register and receiver in 1837, and were subject to the new powers conferred on the Commissioner." The case of Harkness *v.* Underhill, 1 Black, 316, fully sustains the right of the Commissioner to review the action of the register and receiver, and makes use of language which would seem to indicate that the question was fully settled. The court say: "The question is again raised whether this entry, having been allowed by the register and receiver, could be set aside by the Commissioner. All the officers administering public lands were bound by the regulations published May 6, 1836 (2 L. L. & O., 92). These regulations prescribed the mode of proceeding to vacate a fraudulent occupant entry, and were pursued in the case before the court. The question has several times been raised and decided in this court, upholding the Commissioner's powers." The above citations are sufficient to show that the Supreme Court of the United States has more than once had substantially the same question before it, and that since the act of 1836 the jurisdiction of the Commissioner has been sustained and approved. The case of Cornelius *v.* Kessel, 128 U. S., 457; 9 Sup. Ct Rep., 122, does not militate against the doctrine of the cases before decided in that court. On the contrary, when carefully considered, it tends to confirm them; for while it is true that Mr. Justice Field, in deciding that case, in setting out the findings that

may be reviewed by the Commissioner, omits that of settlement and improvement, yet he does not say that this question cannot, in a proper case, be reviewed. On the contrary, he by inference recognizes that right, but says that it cannot be exercised arbitrarily, or so as to deprive an applicant of land lawfully paid for. The language of the opinion, taken as a whole, does not sustain the position of plaintiff in error; and, even if it did, it would lose much force from the fact that this was a case of private entry, where no act was required but the payment of the purchase-money. This case, as we understand it, only asserts the recognized doctrine that the courts will inquire into the decisions of the Land Office as to questions of law, and, if erroneous, correct them. It may also be gathered from this case, as well as many others decided by the same court, that if the land officers have been imposed upon, and by mistake and fraud been induced to decide a question of fact wrongly, the court will interfere to protect the rights of the parties. This last question may at some future time arise upon the facts of the case at bar. But that question has not, and probably could not have, been raised in this case, and it is not necessary that we should say anything in regard thereto. On the whole case, we agree with the contention of the defendant in error, and the case must be affirmed.

Anders, C. J., and Scott, J., concur. Stiles, J., did not sit at the hearing.

DUNBAR, *J.* (dissenting):

After as thorough an investigation of this cause as time and opportunity would permit, I find myself unable to concur in the majority opinion, and will at some future time express my grounds of dissent.

Filed February 11, 1891.

SOL. SMITH, *Clerk.*

25 64.

Dissenting.

As I indicated at the time of the filing of the majority opinion, I will now give some of my reasons for dissenting thereto.

It is a common remark by practitioners before the Land Department that the land laws "do not amount to anything, but that everything depends upon the instructions;" but, in the investigation of rights under the land laws, I prefer to look first at the law and see if any provisions are made by the law or direct authority given by the law for the action of the Commissioner, or whether the authority is conferred upon the Commissioner under his supervising powers to set aside the findings of the register and receiver on the questions of residence and cultivation in case of a pre-emption proof, which is the point involved in this case. An examination of the pre-emption law shows that preceding sections state what

lands shall be subject to pre-emption entry, who are qualified pre-emptors, etc., while section 12 of the act of 1841, corresponding with section 2263 of the Revised Statutes, provides that "prior to any entries being made under and by virtue of the provisions of this act proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands may lie agreeably to such rules as may be prescribed by the Secretary of the "Treasury," now, by subsequent enactment, changed to Secretary of the Interior. It seems to me that there is no room for a construction of this
26 section. Here is a judicial authority conferred upon a tribunal in language plain and unmistakable. The power is conferred as plainly as words can state a proposition. It is the judgment of the register and the receiver that is to be satisfied, not the judgment of the Commissioner or the Secretary of the Interior. This is a judicial investigation on their part, not merely a clerical or administrative duty to be performed. A fact is to be judicially determined from evidence adduced under certain rules and regulations of law. The rules and regulations governing the admission of this testimony or the mode of procedure are prescribed by the Secretary of the Interior, and it is the duty of the Commissioner to see that these rules and regulations are observed, and that the investigation is conducted in accordance with them, but *but* the judicial enquiry and determination of the facts under those prescribed rules are matters exclusively within the jurisdiction of the register and receiver, so far as settlement and improvement are concerned. I repeat, that if this investigation has not been carried on agreeably to or in conformity with such rules as the Secretary is authorized to make, then for that reason only should the Commissioner reject the proof or send it back for a rehearing, for when those officers have obtained jurisdiction by reason of all the other requirements of the law having been met, and when their discretion and judgment has been legally exercised and a decision reached on the questions of settlement and improvement, questions espe-
27 cially submitted to their discretion by the law, that decision is not subject to the supervising powers of superior officers. There is a vast difference between prescribing rules and regulations and usurping judicial functions.

Supervisory powers may be exercised over acts which are purely administrative or executive, but the distinction must be constantly kept in view between acts which are administrative or executive and those which are judicial in their character.

Under this section the register and receiver are authorized by law to exercise their discretion judicially, and — was well said by the court in Butterworth *vs.* Hoe, 112 U. S., 50, "It is not consistent with the idea of judicial action that it should be subject to the direction of a supervisor in the sense in which that authority is conferred upon the head of an executive department in reference to his subordinates. Such a subjection takes from it the quality of a judicial act."

But it is asserted by counsel for defendant in error that the

Commissioner, at the time of ordering a rehearing in this case, acted with authority, because the following circular instructions were then in force, viz:

"Failure to inhabit and improve the land in good faith, as required by law, renders the claim subject to contest and the entry to investigation."

"Final proof in pre-emption cases must be made to the satisfaction of the register and receiver, whose decision, as in any other case, is subject to examination and review by this office."

28 I answer that if he had no authority before the publication or issuance of these instructions, he manifestly had none afterwards. Courts must confine the enactments of laws to law-making powers. The Congress of the United States is the only body that can make laws regulating the sale or disposition of the public lands. The Secretary of the Interior is authorized to prescribe rules and regulations to make the laws effective and to exercise supervisory powers in certain instances, but he is not authorized to make new laws, to increase his own powers, or to take away any judicial authority that has been especially or even generally conferred upon another tribunal.

If the Secretary or Commissioner are allowed arbitrarily, without any appeal, to substitute their discretion for that of the register and receiver on subjects especially submitted to them, they might logically go further and dispense with their judgment altogether.

If fraud is alleged in obtaining the final receipt, says Judge Deady, in Smith *vs.* Ewing, 23 Fed. Rep., 741, the Government must seek redress in the courts, where the matter may be heard and determined according to the law applicable to the rights of individuals under like circumstances. The right of a party holding a certificate of purchase of public land and that of his grantee is a right in and to property of which neither of them can or ought to be deprived without due process of law." I think the case of Wilcox *vs.* Jackson, 13 Peters, 498, fairly sustains the theory of the plaintiff in error; also Lyttle *et al. vs.* State of Arkansas.

29 It must be borne in mind that it is not contended by appellant that the action of the register and receiver cannot be reviewed, but the contention simply is that their decision on these two questions of residence and improvement only cannot be reviewed in a pre-emption case, and such I believe to be the distinction made by the cases generally, and those cases cited wherein their decisions have been reversed or set aside on some other ground do not involve the pertinent question in this case and should not be considered. This distinction, I think, was plainly maintained in the late case of Cornelius *vs.* Kessel, 128 U. S., 456. Said Mr. Justice Fields in a well-considered opinion: "The power of supervision possessed by the Commissioner of the General Land Office over the acts of the register and receiver of the local land offices in the disposition of the public lands undoubtedly authorizes him to correct and annul entries of land allowed by them where the lands are not subject to entry or the parties do not possess the qualifications required or have previously entered all that the law permits,"

fairly implying that the entry could not be annulled on the ground of want of proof of settlement or cultivation.

But it is contended that the earlier cases are not in point, because they were decided on controversies which arose prior to the passage of the act of 1836, which enlarged the supervisory powers of the Commissioner, the first section of which act is as follows: "That from and after the passage of this act the executive duties now prescribed or which may hereafter be prescribed by law appertaining to the surveying and sale of the public lands of the United
30 States or in anywise respecting such public lands, and also such as relate to private claims of land and the issuing of patents for all grants of land under the authority of the Government of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office under the direction of the President of the United States."

I am of the opinion that the act of 1841 was intended for a full, complete, and independent pre-emption law, and if it be conceded that the act of 1836 modified the act of 1830 with reference to the powers of the register and receiver, the re-enactment of the same section in 1841 must be concede- to be a restoration of that authority, and their decision would again be final on that point, and this view of the law is in harmony with Johnson *vs.* Towsley, 13 Wallace, 72, wherein Justice Miller says that the act of 1841 so enlarged the right of pre-emption as to have been ever since considered the main source of pre-emption rights; and it may be observed in this connection that in all the cases relied upon by the majority that while the decisions were rendered subsequent to 1841, yet all the controverted facts had transpired prior to the passage of the act of 1841.

However, conceding that the law of 1836 is still in full force, I cannot conceive how it can in any manner conflict with section 12 of the law of 1841, for it will be observed that the law of 1836 refers exclusively to the executive duties appertaining to the survey and sale of the public lands. Certainly an executive act spoken of in general terms in the act of 1836 has no reference to a judicial
31 duty especially imposed upon a certain tribunal; but if there could possibly be any doubt on this question it has been squarely met and settled in the case of Butterworth *vs.* The U. S., 50. There it was announced that "the executive supervision and direction which the head of a department may exercise over his subordinates in matters administrative and *and* executive do not extend to matters in which the subordinate is directed by statute to act judicially."

This was a case growing out of the Patent Office Department; but the subject of supervisory powers in general, including the supervisory powers in the Land Department, was reviewed with care and ability by Mr. Justice Matthews, and the doctrine announced therein, it seems to me, is squarely decisive of this case.

So far as the case of Harkness *vs.* Underhill is concerned, I cannot see its application to the case at bar. That was not a contest under the pre-emption laws, but simply under a special law passed

April 5th, 1832, which allowed parties a pre-emptive right to purchase not to exceed 160 acres of land which they had already settled and improved prior to the passage of the act, and the parties in that case had made settlement and improvement in anticipation of the passage of the act. The act especially provided that all the entries should be made under regulations prescribed by the Secretary of the Interior. There was no provision in the act for proof of residence or improvement to the satisfaction of the register and receiver, and the main question involved in this case was not and could not have been involved in that.

32 Bernard's Heirs *vs.* Ashley's Heirs seem to be more in point, so far as some of the expressions in the opinion of the court are concerned, though the material facts in that case were essentially different from the facts in this case. There one of the main questions involved was whether or not the lands were subject to pre-emption at the time of Bernard's attempted entry. It is not contended here that that would not be a proper question for review by the Commissioner.

I do not think that it is the province of the court to nullify a plain provision of the law by an argument based upon the bad policy of the law. That is purely a legislative prerogative, though in my judgment the view of the law as contended for by the appellant can be maintained upon the highest grounds of public policy and in strict accordance with a just and equitable administration of the laws.

It is and should be the policy of the law that rights should be speedily adjusted, and that litigation should be terminated as soon as is possibly consistent with a rightful determination of the matters in controversy. Especially is this true with reference to rights under the land laws, where the home of the citizen is involved. Every consideration of public policy and of private right then calls for a speedy adjustment. The law recognizes this necessity and, while leaving the more general questions to be reviewed and determined by the higher officers of the department, especially clothes a local tribunal with the power of determining the local fact

33 of residence and improvement, under such rules and regulations as may be prescribed by the department.

These officers are on the ground. They are acquainted with the character and reputation of the people making the proof. In many instances they meet the witnesses face to face. In fact, this was the universal practice at the time the law was enacted. They are acquainted with the country, its topography, its soil, and its climate. They know the peculiar circumstances surrounding the settler in his sometimes successful and sometimes unsuccessful efforts to cultivate the soil, and they are better calculated to pass intelligently on the settlers' rights in those particulars than is the Commissioner or Secretary, albeit they are lower officers in the department and are more remote from the seat of government. As one member of this court, I cannot indulge in the presumption that an officer's tendency to a careless or corrupt administration of a trust reposed in him is in

proportion to his rank or the distance of his habitation from the seat of government. I prefer to believe that—

> "The rank is but the guinea stamp;
> The man 's the gowd for a' that."

But that all possible safeguards might be thrown around this investigation, the act of 1879 provides that notice of proof shall be given by publication in a newspaper nearest to the land in question for thirty days before the day of proof, and that the names of the witnesses by which claimant intends to establish his claim
34 shall be given in such publication. Opportunity is thus given to any one who has knowledge of bad faith on the part of the claimant to appear and resist the claim. Up to this time the settler understands that he must look out for and have on hand the necessary witnesses, and he makes arrangements accordingly. He makes his proof as the law requires and to the satisfaction of the tribunal empowered by the law to pass upon the sufficiency of the proof. No one appears to contest his right. No appeal is taken from the decision rendered. He pays the money demanded by the Government and, so far as he knows and is able to ascertain, the case is closed. His final certificate issued, he takes possession of the land and pays taxes on it. His witnesses are allowed to depart and leave the country, as they are very liable to do in all new countries. He makes valuable improvements on the land, and all the results of his years of labor between the time that he makes his proof and the long time which frequently elapses before patent issues is absorbed by the land; and I agree with the attornies for the appellant, that to subject him during all this time to the uncertainties of an arbitrary proceeding or hearing before the officers of the executive or political branches of the Government at a time when he may be helpless to secure the evidence which he needs and where he may be overwhelmed with so-called testimony, which does not have the sanction even of an oath upon which perjury can be prosecuted, is so obviously unjust and unfair that the courts ought not to sanction it.

35 In the case at bar Pierce made his final proof to the satisfaction of the register and receiver on the 13th day of February, 1883, paid to those officers the sum of $400, and received his "patent certificate." No appeal was taken from this decision, but six months afterwards Frace, a stranger, filed with the Commissioner an affidavit alleging that Pierce had not established a residence upon said land. No action was taken by the Commissioner upon this notice until May 16, 1885. Thus it will be seen that after the expiration of two years and three months from the adjudication of this case Pierce's right to this land was called in question in this summary manner. The judgment was reopened and set aside. The land was awarded to the informer, the Government retaining the purchase price paid by Pierce presumably upon the ground that perjury had been committed in making the proof, without giving him an opportunity to answer that charge in a court of competent jurisdiction, where a judicial determination could be had

on that question. There is no claim that the land was not properly subject to pre-emption entry, or that Pierce was not a qualified pre-emptor, or that the register and receiver had not complete jurisdiction of the case when it was first tried, but the sole question involved was one of residence. This question having been once decided by the proper tribunal and certificate of patent having issued, I think that the Commissioner acted without authority of law in disturbing that decision.

R. O. DUNBAR, *J.*

36 In the Supreme Court of the State of Washington, January Session, A. D. 1891.

EBEN PIERCE, Appellant,
vs.
JAMES A. FRACE, Appellee. } No. 64. Judgment.

This cause having been heretofore submitted to the court upon the transcript of the record of the superior court of Pierce county and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises, and having filed its opinion in writing, it is now, on this 11th day of February, A. D. 1891, on motion of Messrs. Judson, Sharpstein & Sullivan, of counsel for appellee, considered, adjudged, and decreed that the judgment of said superior court be, and the same is hereby, affirmed with costs, and that the said James A. Frace have and recover of and from the said Eben Pierce the costs of this action, taxed and allowed at one hundred and thirty-nine dollars, and that execution issue therefor; and it is further ordered that this cause be remitted to the said superior court for further proceeding in accordance with the opinion herein filed.

Entered, vol. 1 of Record, page 271.

37 EBEN PIERCE, Plaintiff in Error,
vs.
JAMES A. FRACE, Defendant in Error.

Petition for Rehearing.

Comes now the plaintiff in error, by Doolittle, Pritchard & Stevens, his attorneys, and moves the court to grant a rehearing in the above-entitled cause, and, in accordance with the rules of this court, presents the following argument in support of said motion, viz:

I.

In view of the great value of the property involved in the decision of this cause, and especially in view of the transcendent importance of the question which the court has been called upon to decide, we think no apology is necessary for presuming to ask for a rehearing and for presenting to the court a further argument in support of the contention of the plaintiff in error.

From the opinion of the court pronounced in this cause we are satisfied that more than usual attention has been given to the question involved, and that the court, so far as its time would admit, has carefully and patiently considered the authorities which have been cited by counsel upon both sides; but we think it is not unwarranted presumption to assume that counsel have had more time to give to the subject than the court could possibly devote to it, and
38 that we may be able, therefore, by some suggestions which we propose to offer, to persuade the court to grant the rehearing which we pray for.

After reading the opinion of the court as published we are satisfied of what we had no reason to doubt before the opinion was given, viz., that the reasons in support of the position for which we contend are very strong and would appeal with peculiar force to the courts of this new western country, in which this question arises. Indeed, we think the court would feel impelled to excuse itself for going contrary to the tendency of this reasoning upon the sole ground that it feels impelled to do so by the apparent weight of authority which is brought to bear in opposition to that reasoning; in other words, that the supreme court of the State of Washington, if it should finally conclude to decide this case adverse to our contention, would be inclined to adopt the language used by the supreme court of the State of Minnesota in the case of Judd *vs.* Randall, 29 Northwestern Reporter, 589, which language is as follows: "If we were not constrained by the considerations to which we are about to allude, it is probable that our decision would be in accordance with that under review; but without setting forth the reasons which lead our minds toward that conclusion we will state briefly the ground of our decision to the contrary."

The decision under review in that case was in accordance with our contention in the case at bar, and the supreme court of the State of Michigan excuses itself for rendering a contrary decision by referring to prior cases in that State and to the case of Harkness *vs.* Underhill, 1st Black, 316.

39 II.

The supreme court of the State of Washington, in rendering its opinion in this cause, has decided only one question adversely to our contention, and in deciding that question has relied upon two cases from the Supreme Court of the United States, viz., the case of Barnard's Heirs *vs.* Ashley's Heirs, 18 Howard, 43, and Harkness *vs.* Underhill, 1st Black, 316. It is in reference to these two cases that we wish to make some suggestions.

(*a.*) Both cases seem to be reported with unusual laxity, and the meagre statement of the facts in these cases, we think, has caused the court to attach undue importance to them.

(*b.*) In the case of Barnard's Heirs *vs.* Ashley's Heirs a very close and rigid examination reveals certain facts which we are certain we can show to the court upon a rehearing.

(*c.*) It appears that Barnard's heirs were defeated in their claims

by the judgment of the Supreme Court as well as by the judgment of the circuit court under review.

(*d.*) It appears that Barnard claimed nothing more than a pre-emption right, and it does not appear that his entry was ever allowed.

(*e.*) Barnard's heirs claimed only by virtue of an assignment of a right of pre-emption.

(*f.*) Barnard, instead of making proof to the satisfaction of the register and receiver, had merely attempted to make proof before these officers, and his proof had been rejected.

40 (*g.*) Barnard's heirs were simply asking the court to reverse the decision of the register and receiver in the very manner which, as we contend, is especially committed by statute to them to determine judicially, and which, when determined by them, we contend, is conclusively settled.

(*h.*) On the other hand, Ashley's heirs claimed in substance that at the time when Barnard attempted to make entry of the lands in question their ancestor, Ashley, was the actual owner of the lands in controversy under adverse grants, which contention, if found to be true, as it was found by both courts, was sufficient to oust the register and receiver of any jurisdiction whatsoever.

III.

From these facts it will be seen that if the contention of Ashley's heirs was correct the finding of the register and receiver was wholly immaterial and irrelevant to the controversy, and if the contention of Barnard's heirs was correct, then, according to our position in the case at bar, the decision of these officers upon the question involved was final and conclusive, and upon either of these assumptions the decision of the circuit and Supreme Courts could not have been otherwise. The same conclusion might also have been reached upon the ground of the invalidity of the assi*h*nment. See Myers *vs.* Croft, 13 Wallace, 291, where the difference between a pre-emption right and a pre-emption entry is clearly pointed out.

IV.

If the decision of the court had been in favor of Barnard's
41 heirs it would have been diametrically opposed to the doctrine that is established as well as any proposition can be by a uniform current of decisions by the Supreme Court of the United States—that is, it would have been contrary to the proposition that decisions of the Land Department upon matters of fact cognizable by it in the absence of fraud or imposition is conclusive everywhere else. See—

Lee *vs.* Johnson, 116 U. S., 48;
Johnson *vs.* Towsley, 13 Wallace, 72;
Warren *vs.* Brunt, 19 Wallace, 646;
Shepley *vs.* Collins, 91 U. S., 330;
Moore *vs.* Robbins, 96 U. S., 530;
Marquez *vs.* Frisbie, 101 U. S., 473,

and numerous other cases not necessary to cite here.

V.

We are confident that upon a rehearing we can satisfy the court that any language found in the opinion in the case of Barnard's Heirs *vs.* Ashley's Heirs which seems to militate against our contention in the case at bar is mere *obiter dicta*, and that this language, when viewed in the light of the facts in the case, is not at all antagonistic to our contention in the case at bar; and here we would suggest that if the rehearing be granted so that we can have time to do so we shall send to Washington, D. C., and obtain a full statement of the facts in the case.

We assent with greater confidence that this case of Branard's Heirs *vs.* Ashley's Heirs is not really hostile to our position
42 because of the fact that it has not been so regarded by Judge Deady, nor by the many other courts of the various States which we have cited in our brief and reply brief in this cause, but a careful examination of the case we are sure will show that our suggestions are well founded.

VI.

The other case relied upon, viz., that of Harkness *vs.* Underhill, is very clearly not hostile to our contention in the case at bar. In this case the entry which was set aside by the officers of the Land Department was not made under the pre-emption law of 1830, nor that of 1834, nor that of 1841, but was really a private sale or purchase, a pre-emptive right to which was claimed under the provisions of a special act of April 5, 1832. The provisions of that act gave to an "actual settler and housekeeper" a pre-emptive right to purchase land at private sale. The act did not provide in terms nor by implication for any means of ascertaining the fact of whether the applicant was an actual settler or housekeeper. There was no provision, either directly or indirectly, that this fact should be proved to the satisfaction of the register and receiver, the only provision upon the subject being a requirement that an affidavit should be filed at the time an application was made to purchase. Hence it is clear that this act did not constitute the register and receiver a special tribunal to determine this question of fact as the pre-emption law of 1830 and that of 1841 does in relation to the fact
43 of the residence and improvement therein provided for. Under this law of 1832 the duties of the register and receiver were simply ministerial and not judicial in any sense, and of course we concede that the ministerial acts of the register and receiver are subject to the direction of their superior officers, and the general supervisory power of the Commissioner of the General Land Office would be sufficient to authorize him to cancel such a sale or claimed entry as that which was before the court in the case of Harkness *vs.* Underhill. The question was really a question of the qualification of the party to make the purchase of the land in question.

The distinction which we here point out can only be made apparent by reference to the law of April 5, 1832, and a comparison of

that act with the general pre-emption acts, and especially with the act of 1841, which is still in force.

VII.

While the language of the court in these two cases could not be adopted to its full extent in the opinion of the court in the case at bar, yet when read in the light of the facts we are confident that it does not in the least degree militate against the position which we assert in this case.

The language used by us in our original brief in stating the proposition for which we contend was not so fortunately collected as it might have been, and after more careful study and deliberation we wish to state that the proposition which we contend for in this case is simply this—that the decision of the register and receiver
44 that a pre-emption claimant has fully complied with the law in the matter of residence and cultivation, when made in a case of which these officers have jurisdiction in accordance with the rules prescribed by the Commissioner of the General Land Office, made at the time previously appointed and designated as the date of making final proof and after the previous notice required by the statute in regard to the witnesses, that would be examined and in other respects made in accordance with law is final and conclusive and at least is entitled to more weight than a subsequent finding of the same officers made merely at the suggestion of the Commissioner of the General Land Office and without any authority of law other than the mere dictum of the executive officers of the Government.

VIII.

We wish the court to carefully note that there is one thing at least which distinguishes the case at bar from any case which has been cited in favor of the defendant in error, and that is the fact that in the case at bar it is admitted on the record that at the time of the entry in question the land in question was unoccupied and unappropriated lands of the United States, there being no claim made to it at that time by any person whomsoever, either under the pre-emption law or any other law, or any adverse grantor claim of any character whatsoever. From this fact it follows that when the register and receiver in the first instance determined the question that Pierce had complied with the law in the matter of resi-
45 dence and cultivation the jurisdiction of these officers to determine this question was full and complete. It also appears that in all respects it was a case in which the duty devolved upon them to decide these facts judicially. This, we claim, is entirely sufficient to distinguish the case at bar from the cases of Branard's Heirs *vs.* Ashley's Heirs and Harkness *vs.* Underhill, *supra*.

IX.

We confidently assert that the cases of Wilcox *vs.* Jackson and Lytle *vs.* The State have never been overruled or questioned in so far as they assert the doctrine that the determination of the ques-

tion of residence and cultivation is submitted by section 2263 of the Revised Statutes to the register and receiver as a special tribunal to determine, which section seems unquestionably to bear that meaning upon its face.

This section has been in force ever since 1841 and is substantially the same as a similar section in the act of 1830; but it is claimed that the act of 1836, which is also still in force, modified the provisions of the act of 1830. It seems to us that with equal force of logical reasoning we *might* contend that the act of 1841, being subsequent to that of 1836, modifies that act and gives to registers and receivers all the power and authority which they had under the law of 1830 and again makes their decisions final, as they were *had* to be under the act of 1830. This, it would seem, would be the rule if it were found that the act of 1836 is really in conflict with the provisions relating to the register and receiver already
46 referred to; but our opinion is, and it seems to us we can satisfy the court, that the general provisions enacted in 1836, providing that "from and after the passage of this act the duties now prescribed or which may hereafter be prescribed by law appertaining to the surveying and sale of the public lands of the United States or in anywise respecting such lands, etc., shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States," *does* not conflict with nor in any manner modify the power of the register and receiver nor in any manner affect the conclusiveness or finality of their determination of the question which they did determine in the case at bar.

It is true that the court in its *obiter dicta* opinion in the case of Barnard's Heirs *vs.* Ashley's Heirs says that "the act of 1836 modifies the powers of the register and receivers to the extent of the Commissioner's action in the instances before us;" but in order to understand this language it is necessary to know what "instances" were before the court in that case and to determine whether the "instances" before that court were the same that are now before this court in the case at bar, and this is the very point which seems to us to be decisive of the matter.

The instances before the court in the case of Barnard's Heirs *vs.* Ashley's Heirs did not in any way involve the question of whether the decision of the register and receiver determining that a
47 pre-emptor's residence and improvement complied with the law was final or conclusive or could be overturned by so-called subsequent proceedings, actuated without authority of law and upon new testimony. Now, if the *obiter dicta* of the courts in the cases referred to are to be given any weight at all, they are not entitled to any more weight than the language which we have quoted from other decisions, which language the court also finds to be *obiter dicta*.

X.

In the cases of Cornelius *vs.* Kessell, Johnson *vs.* Tromsloy, and in some of the other cases which we have cited, will be found lan-

guage which certainly tends as much to support our contention as the language above referred to militates against it; but we are left to grope about in the uncertainty of *obiter dicta*. We have the cases of Elliott *vs.* Piersol, Wilcox *vs.* Jackson, and Lytle *vs.* The State of Arkansas, in which the very question involved is decided, and these decisions, it will hardly be claimed, have ever been overruled. Then we have the case of Lindsley *vs.* Hawes, 2nd Black, 554, which distinctly decides that the cancellation of the pre-emption certificate in that case was an illegal and void act; and, although the ground upon which the certificate was cancelled was not the same as the ground of cancellation in the case at bar, yet it is decided at least that when the question is presented to the court the court must determine whether the alleged ground of cancellation is a legal and valid ground or whether it is not.

48 In the case at bar the ground of cancellation was that at an unauthorized hearing, upon new testimony taken without authority of law, the officers of the Government arrived at a different conclusion as to the facts of residence and cultivation from that which the register and receiver had formerly arrived at upon a hearing which was specially authorized by statute.

XI.

We believe it was conceded by counsel for defendant in error on the argument of this cause, and it certainly seems to be conceded in all cases argued and determined in the State courts as well as in the inferior Federal courts, that the precise question presented by the case at bar has never been determined by the Supreme Court of the United States since the time of passage of the act of 1836, above referred to. But there is no case which was cited in our reply brief, though we fear the citation was so obscure that it has been overlooked, and hence we wish to call special attention to it. We refer now to the case of The United States *vs.* Butterworth, 112 U. S., 50, and, while the questions in this case arise out of the administration of another branch of the Interior Department of the Government, we cannot see any reason why the principle involved and decided is not substantially the same as that in the case at bar. One branch of the syllabus, to which we call special attention, is in the following language:

49 "The executive supervision and direction which the head of a department may exercise over his subordinates in matters administrative and executive do not extend to matters in which the subordinate is directed by statute to act judicially."

If this is a correct principle, is it not decisive of the case at bar in our favor? Has it not been established by an overwhelming authority that the register and receiver are directed by statute to act judicially in deciding the question of residence and improvement upon final proof of a pre-emption claim? We certainly think this question will be answered in the affirmative, and the only contention in opposition to our claim has been that, by virtue of the law of 1836, the Commissioner of the General Land Office was given supervision and control of all executive duties theretofore prescribed

or that might thereafter be prescribed respecting sales of lands, etc. Can it be claimed that this duty of the register and receiver to hear and determine the questions of residence and improvement is merely executive duty? We certainly think it cannot; but if it is a judicial duty, then it is not subject to any control or supervision of the Commissioner of the General Land Office except, of course, in so far as the mode of procedure may be regulated by rules prescribed.

In this case of United States *vs.* Butterworth the court, in the course of its opinion, says: "And, in respect to the particular illustration drawn from the relation of the General Land Office
50 to the Department of the Interior, the language of the section of the Revised Statutes describes the duties of the Commissioner to be performed under the direction of the Secretary as executive duties, while those with relation to the decision of questions of private right under the pre-emption laws, being quasi-judicial, are made by section 2273 expressly subject to an appeal, 1st, from the register and receiver to the Commissioner and from him to the Secretary."

We think it is plain that the argument of the learned judge, if written out *in extenso*, would read substantially as follows: That whereas the duties of the Commissioner are described in the statute as executive duties and the only control and supervision conferred upon the Commissioner are those in relation to executive duties, and whereas the same statutes have committed certain questions of private right under the pre-emption laws to the register and receiver to be decided judicially, therefore the Commissioner cannot, under the authority conferred upon him, exercise any supervision over the discharge of these judicial duties by the inferior officers of the department; and, again, whereas the statutes have pointed out and designated the instances in which an appeal may be taken from the judicial decision of the register and receiver, the usual rule of statutory -struction is to be applied, viz., *expressio unius est exclusio alterius*, and consequently the Commissioner cannot exercise even appellate jurisdiction over the decision of the inferior officers in any instances except those designated by the statute; and,
51 again, from the fact that appellate jurisdiction is especially conferred upon the Commissioner in the instances referred to, the conclusion should be drawn that the Commissioner, in the absence of such statutory authority, would have no appellate jurisdiction whatever; and, further, that he has no supervisory jurisdiction, because otherwise it would be necessary to confer appellate jurisdiction upon him, for the reason that the supervisory jurisdiction claimed by the defendant in error in this case would be much more efficient, speedy, and untrammelled in any of the instances in which appellate jurisdiction is given than the appellate jurisdiction itself.

We do not see how any one can read this case of United States *vs.* Butterworth without coming to the conclusion that the learned judge would have decided the case at bar in accordance with our contention.

XII.

In conclusion, we would say we are confident upon a rehearing the court would be convinced that the case of Barnard's Heirs *vs.* Ashley's Heirs and Harkness *vs.* Underhill are not at all decisive of the case at bar, and our duty to our client as well as our regard for what we conceive to be a very important principle, involving questions of superlative importance to the citizens of this new State, have impelled us to pray the court to grant such a rehearing.

Respectfully submitted.

DOOLITTLE, PRITCHARD & STEVENS,
Att'ys for Pl'ff in Error.

52 STATE OF WASHINGTON, }
County of Pierce, } *ss:*

I hereby acknowledge due and legal service of the within petition for rehearing at Tacoma, county of Pierce, Washington, this 12th day of March, A. D. 1891.

JUDSON, SHARPSTEIN & SULLIVAN,
Attorneys for Def'ts in Error.

Filed March 12, 1891.

C. S. REINHART, *Clerk.*

53 In the Supreme Court, State of Washington.

EBEN PIERCE, Pl'tiff in Error, }
vs. } 64.
JAMES A. FRACE, Def't in Error. }

The petition for rehearing in the above-entit-ed cause is hereby denied.

Entered, page 325, vol. 1, Record.

April 7, 1891.

54 In the Supreme Court, Holding Session at ——, January Session, 1891.

EBEN PIERCE }
vs. } No. 64.
JAMES A. FRACE. }

Cost Bill.

	Dollars.	Cents.
Clerk's fees	12	00
Sheriff's fees		
Attorney fees	15	00
Binding transcript		
District court fees		
Printing brief	112	00
Miscellaneous fees		
Total	$139	00

STATE OF WASHINGTON, } ss:
County of Pierce, }

John P. Judson, being first duly sworn, says that he is of counsel for the appellee in the above-entitled cause, and that the foregoing is a true exhibit of the costs and disbursements necessarily incurred and expended in said cause and court, and that the same is true as he verily believes.

JOHN P. JUDSON.

Subscribed and sworn to before me this eighteenth day of February, 1891.

W. C. SHARPSTEIN,
Notary Public.

Filed Feb. 21, 1891.

SOL. SMITH, *Clerk.*

55 In the Supreme Court of the State of Washington.

EBEN PIERCE, Plaintiff in Error,
vs.
JAMES A. FRACE, Defendant in Error. } Petition for Writ of Error.

To the Honorable T. J. Anders, chief justice of the supreme court, State of Washington:

Now comes Eben Pierce, plaintiff in error in the above-entitled cause, and represents and alleges that on the 11th day of February, 1891, the supreme court of the State of Washington made and entered a judgment in the above-entitled cause in favor of James A. Frace, the defendant in error, and against Eben Pierce, plaintiff in error, for the recovery of the sum of one hundred and thirty-nine dollars, the costs of said action; and also for the affirmance of the judgment of the superior court of the county of Pierce and State of Washington in said cause, and a petition for rehearing having been duly filed was on April 7th, 1891, denied, and on said April 7th the said judgment was finally rendered.

And your petitioner further represents and alleges that said supreme court of the State of Washington is the highest court
56 of said State in which a decision in the said action can be had, and that the said judgment so rendered by said supreme court is a final judgment in said cause.

And your petitioner further represents and alleges that there is manifest error in the record and proceedings in said supreme court of the State of Washington in the following particulars, viz:

First. That by the record aforesaid it appears that the judgment aforesaid was given for the said James A. Frace and against the said Eben Pierce, whereas by the law of the land the said judgment ought to have been given for the said Eben Pierce and against the said James A. Frace.

Second. That by the record aforesaid it appears that the judgment of the said superior court of the county of Pierce, State of Washington, was affirmed by the supreme court of the State of

Washington, whereas by the law of the land the said judgment of the said superior court ought to have been reversed.

Third. That by the record aforesaid it appears that the demurrer of the said James A. Frace to the reply of the said Eben Pierce in the said superior court of the county of Pierce and State of Washington was sustained by the said superior court, and its judgment in sustaining the said demurrer was affirmed by the supreme court of the State of Washington, whereas by the law of the land the said demurrer ought to have been overruled and the said judgment of the said superior court ought to have been reversed.

57 Fourth. That by the record aforesaid it appears that the said action brought by Eben Pierce, as plaintiff, against James A. Frace, as defendant, in the said superior court of the county of Pierce and State of Washington was dismissed by the said superior court, and that the said judgment dismissing said action was affirmed by the supreme court of the State of Washington, whereas by the law of the land the said judgment of the superior court ought to have been reversed.

Fifth. That by the record aforesaid it appears that your petitioner, Eben Pierce, as plaintiff in said action in the superior court of the county of Pierce and State of Washington, claimed and asserted a right and title to the lands described in his complaint, and claimed to be the owner of said lands and entitled to the possession thereof under and by virtue of chapter four of title XXXII of the Revised Statutes of the United States, and especially under and by virtue of sections twenty-two hundred and fifty-nine and twenty-two hundred and sixty-three and subsequent acts of Congress amendatory of and supplemental to said chapter four of the Revised Statutes of the United States relating to pre-emptions, and the said right and title of your petitioner to the said lands under the laws of the United States as aforesaid was by said supreme court of the State of Washington denided, and the said judgment and decision of the supreme court of the State of Washington was against the right and title of your petitioner to the said lands, whereas by the laws and statutes of the United States aforesaid your peti-

58 -oner's right and title should have been sustained and the decision of the said supreme court of the State of Washington ought to have been in favor of his said right and title.

Sixth. That by the record aforesaid it appears that at a time when the lands described in the complaint of your petitioner filed in the said superior court of Pierce county, State of Washington, were vacant and unappropriated lands belonging to the United States and subject to the right of pre-emption your petitioner was in all respects qualified to enter said lands under the statutes of the United States relating to pre-emption claims, and that he did enter the same in pursuance of all the conditions, restrictions, and stipulations provided by the laws and statutes of the United States and did pay therefor to the United States the minimum price for said lands, and prior to making said entry duly made proof of the settlement and improvement required by section twenty-two hundred and fifty-nine of the Revised Statutes of the United States, to the

satisfaction of the register and receiver of the land district in which said lands lie, agreeably to the rules theretofore prescribed by the Secretary of the Interior, whereby your petitioner became the owner of and entitled to the possession of said lands, and yet the decision of the said supreme court of the State of Washington by its judgment aforesaid was against the said right of your petitioner and denied to him his ownership and possession of said lands, to which he was entitled as aforesaid.

59 All of which errors will more fully appear by an assignment of errors in the Supreme Court of the United States, which is filed herewith.

Wherefore your petitioner prays that a writ of error may be allowed to the said supreme court of the State of Washington, whereby the said final judgment may be removed to the Supreme Court of the United States, to be there reviewed and corrected, and that a citation may be issued to the said James A. Frace citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at the city of Washington, D. C., on the second Monday of October, A. D. 1891, there to show cause, if any there be, why the said judgment of the supreme court of the State of Washington should not be corrected, and that the amount of the bond may be fixed which it will be necessary for your petitioner to give in order that execution may be stayed upon the said final judgment and that the said appeal may be duly perfected, and that such other process may be allowed as will enable your petitioner to obtain a review of the said final judgment of the supreme court of the State of Washington and a correction of the said alleged errors by the Supreme Court of the United States.

EBEN PIERCE, *Petitioner*,
By DOOLITTLE, PRITCHARD & STEVENS AND
P. S. GROSSCUP, *His Attorneys*.

Filed April 27, 1891.

C. S. REINHART, *Clerk*.

60 In the Supreme Court of the State of Washington.

EBEN PIERCE, Plaintiff in Error,
vs.
JAMES A. FRACE, Defendant in Error. } Order.

Now, this day, upon the petition of Eben Pierce, as plaintiff in error, for the allowance of a writ of error to the supreme court of the State of Washington in the above-entitled cause, whereby the final judgment and record in said cause may be removed to the Supreme Court of the United States, to be there reviewed and corrected, the undersigned, chief justice of the supreme court of the State of Washington, has found and determined that in the above-entitled action the plaintiff in error, Eben. Pierce, has claimed a right and title under a statute of the United States and the decision of the supreme court of the State of Washington was and is against

the right and title so claimed under said statute, and that the plaintiff in error is entitled to have said records and proceedings in the above-entitled action and the final judgment of the supreme court of the State of Washington therein reviewed in the Supreme Court of the United States—

61 It is therefore ordered and adjudged that a certificate in the following form be issued by the chief justice, viz:

I, T. J. Anders, chief justice of the supreme court of the State of Washington, do hereby certify that it manifestly appears from the records of that certain case No. 64, heretofore pending in the supreme court of the State of Washington, wherein Eben Pierce is plaintiff in error and James A. Frace is defendant in error, that the plaintiff in error claimed a right and title to certain lands and tenements in his complaint described under and by virtue of a statute of the United States, and that the decision of the said supreme court of the State of Washington, which is the highest court of said State in which a decision in the said action could be had, was against the said right and title so claimed by the plaintiff in error, Eben Pierce—that is to say, the plaintiff in error, Eben Pierce, as appears by the records of the above-entitled action, claimed to be the owner and entitled to the possession of certain lands and tenements in his complaint described, under and by virtue of chapter four of title XXXII of the Revised Statutes of the United States relating to pre-emptions, and the subsequent act amendatory of and supplemental to said chapter four, and especially under and by virtue of the provisions of sections twenty-two hundred and fifty-nine and twenty-two hundred and sixty-three of the Revised Statutes of the United States, and that the decision of the supreme court of the State of Washington in the above-entitled cause was against his said claimed right and title and had the effect of denying his ownership and right of possession to the said lands, and I therefore certify that the said plaintiff in error, Eben Pierce, is entitled to have the said action and the final judgment of the supreme court of the State of Washington reviewed by a writ of error in the Supreme Court of the United States, and the foregoing writ of error is accordingly allowed.

Witness the Honorable T. J. Anders, chief justice of the supreme court of the State of Washington, this 27th day of April, in the year of our Lord one thousand eight hundred and ninety-one.

T. J. ANDERS,
Chief Justice of the Supreme Court of the State of Washington.

62 And it is further ordered that said certificate be spread at large upon the journal of the supreme court of the State of Washington, and that the same be, and is hereby, made a part of the records of said court in the above-entitled cause.

And it is further ordered that a writ of error in the above-entitled action to the supreme court of the State of Washington, whereby the said cause and the final judgment therein may be removed to the Supreme Court of the United States, to be there reviewed and corrected, be, and is hereby, allowed.

And it is further ordered that a citation be issued to the defendant in error in the above-entitled cause to be and appear at the Supreme Court of the United States on or before Thursday, June 25th, A. D. 1891, there to show cause, if any, why the judgment in the above-entitled action should not be corrected.

And it is further ordered that the plaintiff in error, Eben Pierce, give bond unto the said James A. Frace in the sum of two thousand five hundred dollars, conditioned to prosecute his writ of error to effect, and if he fail to make his plea good that he shall answer all damages and costs.

And now, it further appearing to the undersigned, chief justice of the supreme court of the State of Washington, that the plaintiff in error, Eben Pierce, by permission of the undersigned justice, has filed his bond with the clerk of this court in the sum of two thousand five hundred dollars, conditioned according to law, for
63 the prosecution of his writ of error herein, and that if he fail to make good his plea that he shall answer all damages and costs:

It is further ordered that said bond and the sureties thereon be, and the same is hereby, approved, and that all further proceedings upon the final judgment heretofore rendered in the above-entitled action be, and they are hereby, stayed during the pendency of said writ of error.

Done at Olympia, Washington, this 27th day of April, A. D. 1891.

T. J. ANDERS,
Chief Justice of the Supreme Court of the State of Washington.

Filed April 27, 1891.

C. S. REINHART, *Clerk.*

Entered, pg. 330, vol. 1, Record.

64 In the Supreme Court of the United States of America.

EBEN PIERCE, Plaintiff in Error,
vs.
JAMES A. FRACE, Defendant in Error. } Assignment of Errors.

Now comes Eben Pierce, the plaintiff in error, and makes the following assignment of errors in the Supreme Court of the United States in the above-entitled cause, which is hereby removed from the supreme court of the State of Washington to the Supreme Court of the United States by writ of error; and the plaintiff alleges that there is manifest error in the record and proceedings of the said supreme court of the State of Washington in the following particulars, to wit:

First. That by the record aforesaid it appears that the judgment aforesaid was given for the said James A. Frace and against
65 the said Eben Pierce, whereas by the law of the land the said judgment ought to have been given for the said Eben Pierce and against the said James A. Frace.

Second. That by the record aforesaid it appears that the judg-

rment of the said superior court of the county of Pierce, State of Washington, was affirmed by the supreme court of the State of Washington, whereas by the law of the land the said judgment of the said superior court ought to have been reversed.

Third. That by the record aforesaid it appears that the demurrer of the said James A. Frace to the reply of the said Eben Pierce in the said superior court of the county of Pierce and State of Washington was sustained by the said superior court, and its judgment in sustaining said demurrer was affirmed by the supreme court of the State of Washington, whereas by the law of the land the said demurrer ought to have been overruled and the said judgment of the said superior court ought to have been reversed.

Fourth. That by the record aforesaid it appears that the said action brought by Eben Pierce, as plaintiff, against James A. Frace, as defendant, in the said superior court of the county of Pierce and State of Washington was dismissed by the said superior court, and that the said judgment dismissing said action was affirmed

66 by the supreme court of the State of Washington, whereas by the law of the land the said judgment of the superior court ought to have been reversed.

Fifth. That by the record aforesaid it appears that Eben Pierce, as plaintiff in said action in the superior court of the county of Pierce and State of Washington, claimed and asserted a right and title to the lands described in his complaint, and claimed to be the owner of said lands and entitled to the possession thereof under and by virtue of chapter four of title XXXII of the Revised Statutes of the United States, and especially under and by virtue of sections twenty-two hundred and fifty-nine and twenty-two hundred and sixty-three, and subsequent acts of Congress amendatory of and supplemental to said chapter four of the Revised Statutes of the United States relating to pre-emptions, and the said right and title of the plaintiff in error to the said lands under the laws of the United States as aforesaid was by said supreme court of the State of Washington denied, and the said judgment and decision of the supreme court of the State of Washington was against the right and title of the plaintiff in error to the said lands, whereas by the laws and statutes of the United States as aforesaid the plaintiff's right and title should have been sustained and the decision of the said supreme court of the State of Washington ought to have been in favor of his said right and title.

67 Sixth. That by the record aforesaid it appears that at a time when the lands described in the complaint of the plaintiff in error filed in the said superior court of Pierce county, State of Washington, were vacant and unappropriated lands belonging to the United States and subject to the right of pre-emption, the plaintiff in error was in all respects qualified to enter said lands under the statutes of the United States relating to pre-emption claims, and that he did enter the same in pursuance of all the conditions, restrictions, and stipulations provided by the laws and statutes of the United States, and did pay therefor to the United States the minimum price for said lands, and prior to making said

entry duly made proof of the settlement and improvement required by section twenty-two hundred and fifty-nine of the Revised Statutes of the United States to the satisfaction of the register and receiver of the land district in which said lands lie, agreeably to the rules theretofore prescribed by the Secretary of the Interior, whereby the plaintiff in error became the owner and entitled to the possession of said lands, and yet the decision of the said supreme court of the State of Washington, by its judgment aforesaid, was against the said right of the plaintiff in error and denied to him his ownership and possession of said lands to which he was entitled as aforesaid.

68 Wherefore the plaintiff in error prays the honorable Supreme Court of the United States that the judgment of the said supreme court of the State of Washington in the above-entitled cause may be reversed and held for naught, and that the plaintiff in error may be restored to all things that he has lost by reason thereof.

DOOLITTLE, PRITCHARD &
STEVENS & P. S. GROSSCUP,
Attorneys for Plaintiff in Error.

68½ [Endorsed:] No. 64. In the Supreme Court of the United States. Eben Pierce, plaintiff, *vs.* James A. Frace, defendant. Assignment of errors. Received copy of within this — day of ——, 189–. —— ——, attorneys for —— ——. Filed April 27, 1891. C. S. Reinhart, clerk. Doolittle, Pritchard, Stevens & Grosscup, Fidelity Trust Co.'s building, Tacoma, Wash., attorneys for plaintiff.

69 *Bond.*

In the Supreme Court of the State of Washington.

EBEN PIERCE, Plaintiff in Error,
vs.
JAMES A. FRACE, Defendant in Error.

Know all men by these presents that Eben Pierce and G. F. Orchard and A. B. Graham are held and firmly bound unto James A. Farce, of the county of Pierce and State of Washington, in the sum of two thousand five hundred dollars, to be paid to the said James A. Frace, his executors or administrators; for the payment of which, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 27th day of April, A. D. 1891.

Whereas the above-named Eben Pierce hath sued out a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Washington and desires a stay of proceedings on said judgment:

70 Now, therefore, the condition of this obligation is such that if the above-named Eben Pierce shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

EBEN PIERCE. [SEAL.]
G. F. ORCHARD. [SEAL.]
A. B. GRAHAM. [SEAL.]

STATE OF WASHINGTON, } ss:
Pierce County, }

G. F. Orchard and A. B. Graham, being first duly sworn, each for himself says that he is over the age of twenty-one years, a citizen of the United States, and is a freeholder of Pierce county; that he is not an attorney-at-law nor an officer of a court; that he is worth the amount specified in the foregoing bond over and above all just debts and liabilities and property exempt from execution.

G. H. ORCHARD.
A. B. GRAHAM.

[SEAL.]

Subscribed and sworn to before me this 27th day of April, A. D. 1891.

W. H. DOOLITTLE,
Notary Public in and for the State of Washington,
Residing at Tacoma, Pierce County.

We have received copy and acknowledge — of within this 29th day of April, 1891.

JUDSON AND SHARPSTEIN,
Attorneys for Defendants.

The within bond is approved this 27th day of April, 1891.

T. J. ANDERS,
Chief Justice of the Supreme Court of the State of Washington.

Filed April 27, 1891.

C. S. REINHART, *Clerk.*

71 UNITED STATES OF AMERICA, ss:

To James A. Frace, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, D. C., on or before Thursday, June 25th, A. D. 1891, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Washington, wherein Eben Pierce is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable T. J. Anders, chief justice of the supreme

court of the State of Washington, this 27th day of April, in the year of our Lord one thousand eight hundred and ninety-one.

T. J. ANDERS,
Chief Justice of the Supreme Court of the State of Washington.

I hereby acknowledge due service upon me of the foregoing citation by delivering to me a true copy thereof in the city of Tacoma, county of Pierce and State of Washington, on this 27 day of ——, A. D. 1891.

——— ———,
By ——— ———,
His Attorneys of Record.

[Written across the face:] See back of cover for service.

71½ [Endorsed:] No. 64. In the supreme court of the State of Washington. Eben Pierce, plaintiff, *vs.* James A. Frace, defendant. Citation. We have received copy and acknowledge service of within this 29th day of April, 1891. Judson & Sharpstein, attorneys for defendant. Filed April 27, 1891. C. S. Reinhart, clerk. Doolittle, Pritchard, Stevens & Grosscup, Fidelity Trust Co.'s building, Tacoma, Wash., attorneys for pl'ff.

72 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Washington, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court of the State of Washington, before you, being the highest court of the said State in which a decision could be had in the said suit between Eben Pierce, plaintiff in error, and James A. Frace, defendant in error, said judgment having been entered February 11th, 1891, and finally rendered on April 7th, 1891, when petition for rehearing was denied, wherein a right and title was claimed under a statute of the United States and the decision was against said right and title specially set up and claimed under said statute, a manifest error hath happened, to the great damage of the said Eben Pierce, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on Thursday, the 25th day of June, A. D. 1891, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 27th day of April, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and fifteenth.

Seal United States Circuit Court, District of Washington.

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the District of Washington.

The above writ of error is hereby allowed.

T. J. ANDERS,
Chief Justice of the Supreme Court of the State of Washington.

73 I, T. J. Anders, chief justice of the supreme court of the State of Washington, do hereby certify that it manifestly appears from the records of that certain case No. 64, heretofore pending in the supreme court of the State of Washington, wherein Eben Pierce is plaintiff in error and James A. Frace is defendant in error, that the plaintiff in error claimed a right and title to certain lands and tenements in his complaint described under and by virtue of a statute of the United States, and that the decision of the said supreme court of the State of Washington, which is the highest court of said State in which a decision in the said action could be had, was against the said right and title so claimed by the plaintiff in error, Eben Pierce—that is to say, the plaintiff in error, Eben Pierce, as appears by the records of the above-entitled action, claimed to be the owner and entitled to the possession of certain lands and tenements in his complaint described under and by virtue of chapter four of title XXXII of the Revised Statutes of the United States, relating to pre-emptions, and the subsequent acts amendatory of and supplemental to said chapter four, and especially under and by virtue of the provisions of sections twenty-two hundred and fifty-nine and twenty-two hundred and sixty-three of the Revised Statutes of the United States, and that the decision of the supreme court of the State of Washington in the above-entitled cause was against his said claimed right and title and had the effect of denying his ownership and right of possession to the said lands; and I therefore certify that the said plaintiff in error, Eben Pierce, is entitled to have the said action and the final judgment of the supreme court of the State of Washington reviewed by a writ of error in the Supreme Court of the United States, and the foregoing writ of error is accordingly allowed.

Witness the Honorable T. J. Anders, chief justice of the supreme court of the State of Washington, this 27th day of April, in the year of our Lord one thousand eight hundred and ninety-one.

T. J. ANDERS,
Chief Justice of the Supreme Court of the State of Washington.

73½ [Endorsed:] No. 64. In the Supreme Court of the United States. Eben Pierce, plaintiff, *vs.* James A. Frace, defendant. Writ of error. We have received copy and acknowledge service of within this 29 day of April, 1891. Judson & Sharpstein, attorneys for defendant. Filed April 27, 1891. C. S. Reinhart, clerk. Doolittle, Pritchard, Stevens & Grosscup, Fidelity Trust Co.'s building, Tacoma, Wash., attorneys for pl'ff.

74 STATE OF WASHINGTON, } ss:
County of Thurston, }

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, do hereby certify that the foregoing is a full, complete, and correct transcript of the record of and journal entries in the cause wherein Eben Pierce is plaintiff in error and James A. Frace is defendant in error, together with the original citation and assignment of errors and writ of error on appeal to the United States Supreme Court.

In testimony whereof I hereunto set my hand and affix*ed* the seal of said court, at Olympia, this 21st day of May, A. D. 1891.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk of the Supreme Court of the State of Washington.

Endorsed on cover: Case No. 14,678. Washington supreme court. No. 193. Eben Pierce, plaintiff in error, *vs.* James A. Frace. Filed June 9, 1891.

Office Supreme Court U. S.
FILED.
MAR 7 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

MARCH TERM, 1895.

EBEN PIERCE, *Plaintiff in Error,*
vs.
JAMES A. FRACE, *Defendant in Error,*
No. 193.

and

GEORGE F. ORCHARD
vs.
JAMES A. FRACE.
No. 192.

BRIEF FOR PLAINTIFFS IN ERROR.

W. H. PRITCHARD,
S. F. PHILLIPS,
F. D. McKENNEY,
Attorneys for Plaintiffs in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

MARCH TERM, 1895.

EBEN PIERCE, *Plaintiff in Error*,
vs.
JAMES A. FRACE, *Defendant in Error*,
} No. 193.

and

GEORGE F. ORCHARD
vs.
JAMES A. FRACE.
} No. 192.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

I.

This is an action to recover possession of a tract of land, brought in the superior court of the State of Washington by the plaintiff in error against the defendant in error, and is to be argued and submitted with a similar case, Orchard *vs* Alexander, No. 192 in this Court.

In the court below it was conceded that both cases, though differing somewhat in the facts, involved essentially the same questions.

As this case, No. 193, is the one in which the opinions were rendered in the court below, this brief will deal with

this case as if it stood alone, with the request that the same be used in the other case so far as applicable.

The questions involved are:

First. Had the court jurisdiction of the subject-matter of the action?

Second. Is the title acquired by a pre-emption entry, in a case where the claimant has complied with all conditions precedent to the acquisition of the land, superior to that of a subsequent commuted homestead entry, notwithstanding an alleged cancellation of the former by the officers of the Land Department?

Third. Has the authority to hear and determine questions relating to residence and cultivation in pre-emption cases been vested by statute exclusively in the register and receiver of the land office as a special tribunal?

Fourth. In the absence of fraud and mistake and in a case of which these officers, as such special tribunal, have complete jurisdiction can their decision of these questions, regularly made in pursuance of the statute and rules prescribed, be reversed, set aside, or annulled, or can its effect be overcome by a subsequent decision of the same officers made at a hearing not authorized otherwise than by an order of the Commissioner of the General Land Office, issued by him under the mere supervisory power conferred on him by statute?

Fifth. Under the same conditions can such a decision which has been regularly returned to the General Land Office and never questioned by the Commissioner for over two years, notwithstanding his attention has been specially called thereto by an affidavit challenging the truth of the finding, be set aside, annulled, or overcome by the concurrent act of the successors of these officers in rendering a contrary decision at such subsequent hearing held twenty-seven months thereafter?

Sixth. When a pre-emption claimant has complied with all other conditions of purchase, including payment of the

price, and has such regular decision in his favor in regard to the matter of residence and cultivation and is in peaceable possession of the land, claiming title thereto, are not the equities in his favor sufficient to enable him to assert a right of possession against the forcible invasion and intrusion of a stranger to the land who attempts to justify solely on the ground of such subsequent decision?

II.

The questions were raised, as appears by the record, first by a demurrer to the amended reply of plaintiff in error, and after this was sustained, then by a motion for judgment upon the pleadings. No opportunity was given in the court below for the introduction of any evidence, judgment having been rendered in favor of the defendant in error upon the pleadings.

We take it for granted that the motion of defendant in error for judgment on the pleadings was a waiver of the denials contained in his answer and is an admission of all facts alleged by plaintiff in the complaint and also in the reply, and is also an admission of the truth of the denials contained in plaintiff's reply.

The admitted facts may be briefly stated as follows:

On the 20th day of December, 1880, the land in question was unappropriated public land of the United States. On said day plaintiff herein filed his declaratory statement for the same under the pre-emption laws of the United States. Prior to February 13, 1883, plaintiff, in pursuance of the regulations of the General Land Office, filed and caused to be published for thirty days in a newspaper a notice of his intention to make final proof on said day. On said last-mentioned day plaintiff appeared with his witnesses before the register and receiver of the proper land office and made his final proof, and paid to said register and receiver the proper land-office fees and also the sum of four hundred dollars, the

legal price of said land. Afterward, on the 12th day of March, 1883, the register and receiver accepted said final proof as sufficient, received said sum of four hundred dollars, and executed and delivered to the plaintiff a duplicate receiver's receipt therefor, which by its terms authorized the plaintiff to have and receive from the United States, in the due course of the administration of the General Land Office, a patent for said land. Said sum of four hundred dollars has not nor has any part thereof ever been repaid or tendered back to the plaintiff. In the month of November, 1888, plaintiff was in the peaceable possession of said land and was ousted and ejected therefrom by the defendant. The value of the rents, issues, and profits of said land from November, 1888, until the 17th day of September, in 1889, was the sum of one thousand dollars.

Nearly six months after plaintiff's final proof was so made, namely, on the 7th day of August, 1883, the defendant filed in the office of the Commissioner of the General Land Office an affidavit, in which he charged that plaintiff had at no time established his residence on said land. No adverse action was taken by any of the land officers against plaintiff's entry until after the advent of a new administration; but on the 16th day of May, 1885, the new Commissioner of the General Land Office ordered a hearing to be had, touching the charge so made by the defendant in said affidavit, before the newly appointed register and receiver on the 13th day of July, 1885. The parties appeared at the time of said hearing and submitted evidence upon the subject involved, and said last-mentioned register and receiver found that the plaintiff had not established his residence on said land, and that he failed to cultivate and improve the same as required by law, and accordingly further held that plaintiff's said entry should be canceled. Upon appeal to the General Land Office this decision was affirmed by the Commissioner. Upon appeal from the Commissioner to the Secretary of the Interior on the 31st day of March, 1888,

the Secretary of the Interior affirmed the finding of the register and receiver to the effect that plaintiff had not maintained his residence upon said land as required by law, but did not affirm the finding of said officers as to the question of cultivation and improvement. Among the numerous conditions precedent to the acquisition of public land it is claimed that plaintiff failed in the matter of residence and in that alone, and we may assume that as to all other conditions the law has been fully complied with by him.

We claim also that plaintiff's allegation of ownership in the complaint is, under the circumstances of the case, equivalent to an allegation of compliance with all conditions precedent to the acquisition of the land under the laws of the United States, and consequently the fact of residence on the land as required by law must be deemed to be alleged and therefore admitted by the motion for judgment on the pleadings.

ASSIGNMENT OF ERROR.

We assign for error:

1. That defendant's demurrer to plaintiff's reply was sustained by the lower court.

2. That the lower court rendered judgment for defendant.

3. That the lower court refused to render judgment for plaintiff.

ARGUMENT.

I.

The superior court of the State of Washington had jurisdiction of the subject-matter of this action.

This proposition having been decided by the supreme court of the State of Washington (see Transcript of Record, page 13), we deem it unnecessary to add anything further on the subject; but in this connection we ought perhaps to call attention to the provisions of the statute of the State of Washington under which the right to maintain an action for possession is claimed. Section 538 of the Code of Washington (1881) reads as follows:

"The plaintiff in said action [an action to recover possession of real property] shall set forth in the complaint the nature of his estate, claim, or title to the property, and the defendant may set up a legal or equitable defense to the plaintiff's claim, and the superior title, whether legal or equitable, shall prevail."

In this action neither party claims a legal title; no patent has yet issued from the United States, but both parties are claiming an equitable title, the plaintiff under a receiver's receipt or patent certificate by virtue of a pre-emption entry, and the defendant under a like receipt by virtue of an alleged commuted homestead entry. Under the statute above quoted whichever has the superior title should prevail. We think the jurisdiction of the court to determine this question will hardly be disputed here, and if it should be disputed the jurisdiction will be fully sustained by the authorities cited in this brief, especially under a statute like that of the State of Washington.

It will be observed that it is not necessary in this action to finally determine the question of title to the land in

question, but only to determine the question of the right of possession. We believe it is too well settled to require any extended argument that while the courts are reluctant to interfere with the officers of the Government in the discharge of their duties in disposing of the public lands or to determine conflicting claims of title to such lands until after the United States has parted with the title by the issue of a patent, yet the courts will inquire into the facts and equities to an extent sufficient to ascertain the right of possession and will in this manner deal with the possession as between conflicting claimants.

Marquez *vs.* Frisbie, 101 United States, 473.

The plaintiff claims to be the owner of this land by virtue of having complied with all conditions precedent to its acquisition, and has in good faith asserted his right to its possession. Under the practice of the Land Department he may not be able to obtain the relief to which he is entitled without going into the courts to assert his title. It is true the courts may not finally determine the title in his favor until after a patent issues to some one, but will they not in the meantime lend their aid to maintain his possession of that which he has under actual improvement and cultivation? If he is compelled to wait before resorting to the courts for relief until the issue of the patent, must he in the meantime abandon his dwelling-house and other valuable improvements which he has made upon this land? If he should abandon the land and his improvements thereon, there is no way provided by law for him to give notice of his claim to the land or his equities therein, and the danger is imminent that as soon as a patent issues title will be conveyed to an innocent purchaser, and by such transfer it is evident that his right and claim will be irretrievably lost.

II.

The admitted facts in this cause show that plaintiff's title is superior to that of defendant; hence the plaintiff should prevail and judgment should be rendered in his favor for possession of the land in controversy.

If our contention be correct, that all conditions precedent to the acquisition of this land by plaintiff, including that of residence, stand admitted upon the record, then it would seem clear that any alleged action of the land officers subsequent to plaintiff's entry are without jurisdiction and of no effect.

Under these circumstances, upon the allowance of plaintiff's entry and the issuance to him of the receiver's receipt, the land ceased to be public land and became private property, and the Land Department had no further jurisdiction over it except to transfer the naked legal title remaining in the Government.

Carroll *vs.* Stafford, 3 Howard, 441.
Witherspoon *vs.* Duncan, 4 Wallace, 210.
Wilcox *vs.* Jackson, 13 Peters, 498.

Under such circumstances "the right to a patent is equivalent to a patent actually issued."

Simmons *vs.* Wagner, 101 U. S., 260.

Although the Commissioner of the General Land Office may supervise the action of the register and receiver and in a proper case may cancel an entry on the ground that the same was fraudulent and procured by false testimony, yet such cancellation, "being practically *ex parte*, is not conclusive," and if, in fact, the claimant has complied with the requirements of the law his right to the land will be sustained and will not be affected by such decision.

United States *vs.* Steenerson, 50 Fed. Rep., 504.
Stimson *vs.* Clarke, 45 Fed. Rep., 760.
Stimson Land Co. *vs.* Rawson, 62 Fed. Rep., 426.

The defendant will probably contend that it is not admitted on the record as a fact that plaintiff complied with the condition of residence, but he cannot deny that he made proof of this condition to the satisfaction of the register and receiver; that their decision of the fact was in his favor and his entry was allowed.

On the ground of priority in time the plaintiff's title is superior. It is claimed, however, that plaintiff's entry has been canceled. We think it will not be contended that a mere arbitrary cancellation by the Commissioner or other executive officer of the Land Department, without ground or reason therefor, would be recognized by the courts as having any validity or effect to destroy the vested interest which has been acquired by plaintiff in the land.

See—

Cornelius *vs.* Kessel, 128 U. S., 456.
Stimson Land Co. *vs.* Rawson, 62 Fed. Rep., 426.
Stimson *vs.* Clarke, 45 Fed. Rep., 760.
Lindsley *vs.* Hawes, 2 Black, 554.

Under the admitted facts in this case the plaintiff must have expended a substantial amount of labor and money in the improvement and cultivation of the land in controversy and in erecting a dwelling-house thereon. It is clearly conceded that he has paid $400 in cash therefor and has also paid the Land Office fees and expenses of making his final proof. It may also be assumed that he has paid taxes thereon for at least two years.

See—

Carroll *vs.* Stafford and
Witherspoon *vs.* Duncan, *supra*.

If he can be deprived of this property upon the mere whim or caprice of any man, no matter how high the office which he may hold, it would certainly be subversive of the primary and fundamental constitutional principles upon

which the C[illegible]nc is founded. We proceed, therefore, to search for t[illegible]und or reason for the alleged cancellation of plai[illegible]ff's entry.

There is no contention but that plaintiff has complied with the law in every respect and fulfilled every condition precedent to the acquisition of the title of this land, with a single exception—viz., that of residence. It will be observed that the defendant does not allege the failure of this condition as a fact; he does not dare to tender issue upon this question as a matter of fact, but relies simply upon a so-called decision of the land officers. It is alleged that the successors in office of the register and receiver who allowed plaintiff's entry heard certain evidence upon which they made a finding to the effect that plaintiff had not cultivated or improved or resided upon the land, as required by law. Upon appeal from this decision it was ultimately held and decided by the Secretary of the Interior that plaintiff's cultivation and improvement were sufficient, but that his residence upon the land was not sufficient to comply with the law. So that the only ground or reason that can be assigned for the alleged cancellation of plaintiff's entry is a failure upon his part in the matter of residence, and in that alone, and if this Court finds from the records of this cause that the plaintiff did not fail in the matter of residence, then we assume that the judgment of the lower court will be reversed, and that plaintiff will be given judgment for the possession of the land.

Assuming for sake of the argument that there is no admission except of the existence of these two *adverse* decisions, how stands the matter upon the record in this cause? On the one side, in favor of plaintiff's entry and of the fact that he did reside upon the land as required by law, is a decision of the register and receiver of the proper land office, which has never been appealed from and never in any direct proceeding reversed or set aside, made as the result of a hearing or trial had at the time and in the manner speci-

fically directed and provided by statute and surrounded by safeguards expressly provided by statute for the protection of all parties interested in that hearing, and also made in obedience to such rules prescribed by the Secretary of the Interior as the many long years of experience may have suggested to the Land Department as wise or prudent to protect said hearing and decision from mistake or imposition. And because no appeal was ever taken from this decision we may presume that in the course of the business of the Land Office the proofs submitted at this hearing were returned to the Commissioner of the General Land Office and reviewed by him and found in all respects regular and sufficient.

It will be remembered that during the term of office of the Commissioner, then acting, the affidavit of defendant was filed. Hence that officer's attention must have been particularly called to the proofs in relation to this entry; and from the fact that he took no action only one inference can be drawn, namely, that he deemed the proofs submitted by plaintiff and the decision of the register and receiver thereon entirely regular and satisfactory.

On the other hand, to support defendant's contention that plaintiff did not reside upon the land in the manner and to the extent required by law, there is an alleged decision of the successors in office of the officers in the Land Department who passed upon plaintiff's entry.

This so-called decision was not made in pursuance of any statute or act of Congress, not made at any time designated by law, and there is nothing, either in the record of this cause or in the statute, from which it can be inferred that any rules had been prescribed for the conduct of said hearing. In fact, it was, as we contend, a hearing arbitrarily ordered without authority of law, and the decision resulting from said hearing was without jurisdiction, void, and of no effect. At least, we confidently contend that the decision first made as to this question is entitled to greater weight

than that which was subsequently made. If so, then it follows upon the record before this Court that it must be found that plaintiff's residence upon the land in question was sufficient. If it was sufficient, no reason or ground exists for the alleged cancellation of plaintiff's entry; hence plaintiff's entry is valid and shows in him a subsisting right and title in the land in controversy, which, without any question, is superior to that asserted by the defendant. There is no finding that plaintiff was guilty of any fraud or false swearing. The conflict between the two decisions can only be explained in two ways: either that the testimony at the second hearing was different and of less weight than that produced at the first hearing, or that the officers who rendered the second decision took a view of the requirements of the law essentially different from that entertained by their predecessors. If the second hearing had been that of a contest between claimants it would have been authorized by statute and the case would have been radically different.

Revised Statutes, sec. 2273.

In this case the defendant was not a contestant; he was a stranger to the land—a mere informer or would-be "jumper."

We think we may contend successfully, not only that the former decision has greater weight as evidence of the fact in dispute than the latter, but also that the former decision is, under the circumstances, absolutely conclusive and final. This brings us to the next point in our argument:

III.

Authority to hear and determine all matters relating to cultivation and residence in pre-emption cases is vested by law exclusively in the register and receiver as a special tribunal, and the decision of that tribunal upon such matters coming properly within its jurisdiction is final and conclusive.

1. The general proposition that "when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties the decision of that tribunal, within the scope of its authority, is conclusive upon all others," is so well established that it is certainly not necessary to multiply authorities in support of it.

Moore *vs.* Robbins, 96 U. S., 535.
Elliott *et al. vs.* Piersol *et al.*, 1 Peters, 340.
Johnson *vs.* Towsley, 13 Wallace, 72.
Boatner *vs.* Ventress, 8 Martin, N. S., 644.
Same case, see 20 Am. Dec., 266.

2. The contention for the defendant will probably be that the general rule does not apply to the register and receiver in matters of this kind, for the alleged reason that in the Land Office system they are subordinate officers, who always must act under the supervision and direction of their superior officers, the Commissioner of the General Land Office and the Secretary of the Interior.

For our contention we rely upon section 2263 of the Revised Statutes of the United States and various decisions of this Court. In the pre-emption act of 1830 there was a provision substantially the same as that of section 2263 of the Revised Statutes, with the exception that the rules were then to be prescribed by the Commissioner of the General Land Office instead of the Secretary of the Interior. On April 21, 1836, Hon. Benjamin F. Butler, then the Attorney General, decided and gave as his official opinion that the act of 1830 was substantially the same in this regard as the act of 1813, and that under both acts the power of ascertaining and deciding on the questions as to settlement and improvement was exclusively vested in the register and receiver of the land district in which the lands were situated without any power of revision elsewhere, and that the rules which the act directed the Commissioner of the General Land

Office to prescribe are to be prescribed in advance and then are to be observed and conformed to by the register and receiver; that—

"In weighing the evidence and deciding on its sufficiency these officers act in a judicial capacity, and that the law did not authorize any other officer to reverse or revise their decision, nor to compel them to decide according to the dictates of any judgment but their own."

See—

3 Opinions of Attorney General, 93.

In 1839 this Court announced the same doctrine in the case of Wilcox *vs.* Jackson, 13 Peters, 498, and in that case the Court makes plain the distinction between decisions made upon matters within the jurisdiction of the register and receiver and upon matters not within their jurisdiction, and it is held that if the land claimed is not subject to preemption the decision of the register and receiver would be of no effect.

In the case of Lytle *et al.* against The State of Arkansas the question is directly determined in regard to the act of 1830, and the justice in the course of his opinion says:

"In the third section of the act it is provided that before any entries being made under the act proof of settlement or improvement shall be made to the satisfaction of the register and receiver of the land district in which the lands may lie, agreeable to the rules prescribed by the Commissioner of the General Land Office for that purpose. * * * The register and receiver were considered by the act a tribunal to determine the rights of those who claim preemption under it. From their decision no appeal was given If, therefore, they acted within their powers, as sanctioned by the Commissioner, and their decision cannot be impeached on the ground of fraud or unfairness, it must be considered final."

See—

Lytle *vs.* Arkansas, 9 Howard, 314–328.

It is claimed, however, that by the act of 1836 the law was materially changed, and that the provisions of the last-mentioned act are so far in conflict with section 3 of the act of 1830 as to modify it in respect to the question under consideration, and in support of this contention the cases of Barnard's Heirs against Ashley's Heirs, 18 Howard, 43, and Harkness against Underhill, 1 Black, 316, are cited and much relied upon.

In the first of these cases it appears that Barnard claimed nothing more than a pre-emption right, and it does not appear that his entry was ever allowed. The heirs of Barnard claimed only by virtue of an assignment of the right of pre-emption. Barnard, instead of making proof to the satisfaction of the register and receiver, had attempted to make such proof and his proof had been rejected. Barnard's heirs were asking the court to reverse the decision of the register and receiver upon a matter which, as we contend, is especially committed to them by statute as a tribunal to determine judicially.

On the other hand, Ashley's heirs claimed that at the time when Barnard attempted to make entry to the lands in question their ancestor, Ashley, was the actual owner of the lands, and this latter contention was found to be true by this Court, and that finding was sufficient to oust the register and receiver of any jurisdiction of the matter.

Hence it will be seen that the contention of Barnard's heirs could not have been sustained without denying the very proposition for which we contend; and, on the other hand, if the contention of Ashley's heirs was correct, the finding of the register and receiver was wholly immaterial, because they had no jurisdiction, so that the decision of this Court in that case can stand upon three different grounds, all of which are in entire harmony with our contention here:

First. That the register and receiver had no jurisdiction of the land in controversy.

Second. If they had jurisdiction, then the finding and decision of the register and receiver were final and conclusive.

Third. That the assignment to Barnard's heirs was invalid.

See—

Meyers *vs.* Croft, 13 Wallace, 291.

We respectfully suggest that whatever language is used by the Court in that case militating against our contention in the case at bar is mere *obiter dictum*.

The other case relied upon, Harkness against Underhill, is clearly not hostile to our contention. In that case the entry which was set aside by the officers of the Land Department was not made under the pre-emption law of 1830 nor that of 1834 nor that of 1841, but was really a private sale or purchase of land, the pre-emptive right to which was claimed under the provisions of a special act of April 5, 1832. The provisions of that act gave to an "actual settler and housekeeper" a pre-emptive right to purchase land at private sale. The act did not provide in terms nor by implication for any means of ascertaining the fact whether the applicant was an actual settler and housekeeper or not. There was no provision, either directly or indirectly, that this fact should be proved to the satisfaction of the register and receiver, the only provision on the subject being a requirement that an affidavit should be filed at the time an application was made to purchase. Hence it is clear that this act did not constitute the register and receiver a special tribunal to determine this question of fact as the pre-emption law of 1830 and that of 1841 do in relation to the fact of the residence and improvement therein provided for.

Under this law of 1832 the duties of the register and receiver were simply ministerial and not judicial in any sense, and of course we concede that the ministerial acts of the

register and receiver are subject to the direction of their superior officers, and the general supervisory power of the Commissioner of the General Land Office would be sufficient to authorize him to cancel such a sale or claimed entry as that which was before the court in the case of Harkness against Underhill. The question was really a question of the application of the party to make purchase of the land in question.

In the case of Barnard's heirs against Ashley's heirs Mr. Justice Catron, in his opinion, seems to take the view that section 1 of the act of 1836 is in conflict, to a certain extent, with section 3 of the act of 1830 and concludes that the act of 1836 modifies the powers of registers and receivers to the extent of the Commissioner's action in the instances then before the court. This, we apprehend, will be the contention of defendant's counsel in this cause. Section 1 of the act of 1836 provides—

"That from and after the passage of this act the *executive duties* now prescribed or which may hereafter be prescribed by law appertaining to the survey and sale of the public lands of the United States or in anywise respecting such public lands and also such as relate to private claims of land and the issuing of patents for all grants of land under the authority of the Government of the United States shall be subject to the supervision and control of the Commissioner of the General Land Office under the direction of the President of the United States."

It will be observed that this section relates to executive duties only and not to judicial functions, such as those which are committed to the register and receiver by section 3 of the act of 1830, relating to matters of cultivation and residence. We contend, therefore, that, so far as the question now under consideration is concerned, the law of 1836 in nowise changed or modified the law of 1830, and in this we are supported by the opinion of Mr. Justice Matthews in the case of Butterworth *vs.* United States, 112 U. S., 50, in

which case it is held that the supervision and direction of the Secretary of the Interior do not extend to a review of the action of the Commissioner of Patents in those cases in which by law he is appointed to exercise his discretion judicially; and the general proposition is declared that the executive supervision and direction which the head of a department may exercise over his subordinates in matters administrative and executive do not extend to matters in which the subordinate is directed by statute to act judicially. The learned judge in the course of his opinion further says:

"*It is not consistent with the idea of judicial action that it should be subject to the direction of a superior in the sense in which that authority is conferred upon the head of an executive department in reference to his subordinates.*"

If it should be held that the act of 1836 is so far in conflict with that of 1830 as to have modified the powers of the register and receiver under consideration, then it certainly follows that the re-enactment of those provisions of the law of 1830 in the act of 1841 effected a complete restoration of the law as it existed before the act of 1836. (See Johnson *vs.* Towsley, 13 Wallace, 72.)

Very many decisions can be found sustaining the supervisory powers of the Secretary of the Interior and Commissioner as to numerous questions relating to conditions precedent to the entry of public lands under the pre-emption laws.

It has often been held that if at the time of the hearing before the register and receiver as to the question of residence and cultivation the land in question was not subject to entry, then these officers had no jurisdiction, and consequently their decision was entitled to no consideration.

Wilcox *vs.* Jackson, 13 Peters, 498.
Hosmer *vs.* Wallace, 97 U. S., 575.
Bellows *vs.* Todd, 34 Iowa, 18.

It has also been held that if the officers of the Land Department find that the pre-emption claimant is not qualified to make an entry for the reason that he has already entered all the land which he is allowed by law to enter, or by reason of the fact that the entry is not made for his own exclusive use and benefit, that under these circumstances a decision of the register and receiver as to the matter of residence and cultivation is of no effect because in such cases they have no jurisdiction.

United States *vs.* Steenerson, 50 Fed. Rep., 504.
American Mtg. Co. *vs.* Hopper, 56 Fed. Rep., 67.
Judd *vs.* Randall, 29 N. W. Rep., 589.

These decisions are not at all in conflict with the position for which we contend. In the case of Cornelius *vs.* Kessel, 128 U. S., 457, it is held that the power of supervision and correction of the Secretary and Commissioner is not an unlimited and arbitrary power. By that decision the supervisory power of the superior officers in the Land Department is recognized in the following classes of cases:

First. When the lands are not subject to entry.

Second. When the claimant does not possess the qualifications required by statute.

Third. When the claimant has previously entered all that the law permits.

Fourth. When the entry was made upon false testimony.

To these we might add several other classes, namely:

a. When the claimant has not settled upon nor improved the land in good faith to appropriate it to his own exclusive use, but for the purpose of selling the same on speculation.

b. Where the claimant fails to comply with the statute in regard to giving previous notice of his application to make proof before the register and receiver.

c. Where the claimant fails in any respect to comply with the rules prescribed for making his proof.

As to all questions involved in the classes of cases which we have specified, it cannot be said that they have been confided to any special tribunal to be judicially determined, and hence it may be well contended that their determination is embraced in the general executive and supervisory power conferred upon the Land Department. If, however, there is no question as to any of these matters, and if the sole question involved related to the matter of residence and cultivation, this, we contend, is a subject for determination by the register and receiver, whose judgment thereon cannot be controlled by any superior officer nor even by the courts unless in cases of fraud or mistake.

The case of Smith *vs.* Ewing, 11 Sawyer, 56, S. C., 23 Fed. Rep., 741, is not very fully reported, but, so far as we can ascertain, seems to favor our contention. The language of the Court, in the opinion and the syllabus of the case as reported, go much further than the proposition for which we contend. The same judge, in a later case—Wilson *vs.* Fine, 40 Fed. Rep., 52—rendered a decision which he appears to base upon the principles announced in the former case, but which certainly goes far beyond our contention for plaintiff in error.

In the case of United States *vs.* Steenerson, *supra*, a pre-emption entry was canceled by the Commissioner on the ground that it was not made in good faith, but merely for the purpose of enabling a third party to strip it of timber. The plaintiff offered to prove not only this decision of the Commissioner, but also the facts constituting the bad faith of the pre-emptioner in entering the land not for the pur-

poses of actual settlement and residence, but for the purposes of mere speculation. The lower court rejected this evidence. This was held to be error by the circuit court, and in the course of his opinion Judge Shiras says: "The action of the Commissioner, being practically *ex parte*, is not conclusive."

In the case of Stimson *vs.* Clarke, *supra*, an entry had been canceled upon similar grounds, and Judge Hanford, in the course of his opinion, says:

"The Supreme Court has never yet decided that in a contest proceeding instituted after an entry has been allowed, in which there is a conflict of evidence, the Commissioner can make a decision adverse to the entry upon a mere preponderance of evidence, or that any decision of the Commissioner stated merely in general terms, or as an ultimate conclusion to the effect that a party has not in good faith complied with the law so as to be lawfully entitled to make the entry, is such a decision as to justify the canceling of the entry or warrant any claim-jumper in wresting from another the fruits of years of toil. Until the court of last resort, in a proper case, does make such a decision I cannot do so."

In the case of Stimson Land Co. *vs.* Rawson, *supra*, an entry had been canceled for the same reason, and in that case Judge Hanford, after reviewing numerous decisions of the Supreme Court, says:

"These rules, if not modified by other principles applicable to the facts of a particular case, lead to the conclusion that when a sale or entry of public land which is at the time subject to such sale or entry has been perfected and a patent certificate issued and no irregularity appears on the face of the land office record the purchaser or entryman acquires a vested interest in the land as owner, and the sale or entry cannot be canceled nor can the land be restored to the public domain without proceeding according to the course of equity in a court of competent jurisdiction, the person having such a vested interest being protected by the guaranty contained in the fifth and fourteenth amendments to the Constitution of the United States."

Then, after citing another line of decisions, he further says:

"These decisions logically lead to the conclusion that after a person has made an entry of public land under a law authorizing the same and completed on his part all that the law requires him to do to perfect his right the Commissioner of the General Land Office or the Secretary may receive and consider additional evidence, and if from such evidence said officers erroneously make findings adverse to the claimant as to a material fact he may be defeated and left remediless. These two conclusions, drawn from the decisions of the Supreme Court, are the basis for the opposing contentions of the parties to this suit."

And further on he declares the following proposition as one upon which these apparently conflicting authorities may be reconciled:

"A decision by an officer of the executive branch of the Government pronouncing a forfeiture of private property cannot be binding upon the courts if supported only by a general conclusion, as in this case, that fraud has been committed and that an entry of public land was not made in good faith, with intent on the part of the entryman to take the land for his exclusive use and benefit."

In these cases the ground of cancellation was "bad faith on the part of the claimant in entering the land not for his own use nor for the purposes of actual settlement and improvement, but for purposes of speculation." If such bad faith exists in any case, there is clearly a failure of one of the conditions of entry. There cannot be any contention, however, that he is required by statute to make proof of the fact involved to the satisfaction of any officer. This question is not submitted by statute to the register and receiver as a special tribunal for decision. The claimant is merely required to make an *ex parte* affidavit, alleging the necessary fact, and it is expressly provided that if he swear falsely as

to such fact he shall forfeit his money and his claim to the land.

Revised Statutes, section 2262.

As to this condition, it may well be held, as it has been in these and numerous other decisions, that the fact involved is to be determined by the Land Department under the general supervisory and executive powers.

No decision of this question is required or contemplated before entry, and when a decision is rendered canceling the entry upon this ground it does not conflict with any prior decision. As to this fact, the duty of the register and receiver at the time of allowing the entry is only to receive and file the affidavit, a mere ministerial duty. If subsequently a hearing is ordered and a decision rendered finding a failure as to this condition, it necessarily involves a finding to the effect that the claimant swore falsely in this particular; hence the penalty prescribed by statute must follow, viz., the money and land is forfeited.

Now, if, as we have shown, the courts are disposed to limit the powers of the Commissioner and the effect of findings of the department canceling an entry even upon this ground, can the cancellation of an entry upon the ground of failure in the matter of residence be given any effect or be sustained at all? A decision canceling an entry upon the ground of failure in the condition of residence always stands in conflict with a former decision. It does not involve any finding of fraud or false swearing on the part of the claimant, and, even if it did, there is no penalty of forfeiture prescribed for false swearing in this particular.

The first hearing for allowance of entry is expressly authorized, appointed, and regulated by direct legislative act of Congress, the supreme authority in the disposition of the public lands; the second hearing for cancellation of entry is merely ordered by the executive officers of the Land Department.

It will probably be urged by counsel for the defendant that it has been the practice of the Land Department for many years to exercise the power of cancellation for which they contend, and that this practice ought not now to be disturbed. It should be observed, however, in this connection that if our contention is sustained the effect on the practice in the Land Department would be very slight. There is no provision in the homestead law committing any question for decision to the register and receiver as a special tribunal, and very few questions are thus confided to them except the matter of residence and cultivation required under the pre-emption law. Whatever respect the courts may incline to give to the opinions of the officers of the Land Department and the practice adopted by them, yet it should not be forgotten that the disposal of the public lands is primarily vested in Congress, and that their power and authority in the premises is superior to any of the officers of the Land Department, and that the powers even of the President himself must be subject to the statute law upon the subject. Officers of the Land Department of the Government are agents of the law. They cannot act beyond its provisions nor make any disposition of land not sanctioned by law.

Cunningham *vs.* Ashley, 14 Howard, 377.

In the case of Pargoud *vs.* U. S., 4 Ct. of Claims, Judge Loring, speaking for that Court, says:

"The fifth section of the act of 12th March, 1863, submits "the cases arising under it to the Court of Claims to be *de-*"*cided on proof to the satisfaction of said Court.* This peculiar "phrase is familiar to our legislation, and from early times "its precise signification has been fixed by the usage of the "departments and by repeated decisions of the Supreme "Court; and it has uniformly been held to describe an ex-"clusive and final jurisdiction from which there was no ap-

"peal. * * * So the like words, when applied to the "district courts, have the same effect. Thus, under the natur- "alization acts those courts were to be *satisfied* as to the alien's "residence and his attachment to the principles of the Con- "stitution, etc., are to be made to *appear to their satisfaction*: "and in Spratt *vs.* Spratt, 4 Peters, 393, the judgment of the "district courts on the matters specified was held to be final."

And Chief Justice Marshall, speaking for this Court in the latter case, says:

"The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. This judgment is entered on the record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry, and, like every other judgment, to be complete evidence of its own validity."

Why should not the judgment of the register and receiver upon the very question submitted to them in like manner be equally binding and conclusive?

It cannot be said that this Court is bound by any previous decision upon the precise question here involved. It may not be improper, therefore, to refer to some of the elementary principles of statutory construction. If the words of the section under consideration are taken in their natural, plain, obvious, and ordinary signification and import, it would seem that no other rule of construction need be invoked to determine the intention of Congress to confide this question of residence and cultivation to the register and receiver as a special tribunal; but if it is denied that the words are themselves explicit as evincing such intention, then we may look to the context, the occasion and necessity of the law, and determine the intention according to what is consonant to reason and good discretion.

1 Kent, 462.

To show that the construction of this statute for which we contend is consistent with reason and sound public policy, we can hardly do better than refer to the dissenting opinion of Judge Dunbar in the court below. (See Transcript of Record, pp. 24 and 25.)

The reason for our contention becomes more apparent when we consider that the question of residence is a mixed question of law and of fact, and, involving as it does an inquiry into the intention of the party as well as the acts done in pursuance of such intention, that it very frequently presents a complicated problem involving much doubt and uncertainty. It is very often a question about which the most learned lawyers will honestly differ and in relation to which the courts are not in harmony. Is there not good reason, then, for the distinction that exists in the statutes, according to the construction for which we contend, between the mode of ascertaining the existence of the conditions of residence and cultivation and that of finding compliance with other conditions precedent to the acquisition of lands under the pre-emption law? All other conditions consist of simple facts peculiarly within the knowledge of the claimant and concerning which he could hardly make an honest mistake. As to these, consequently, he may establish their existence prior to entry by his own *ex parte* oath, and he makes his entry and pays his money with notice, found in the statute upon which all his rights depend, that, if the officers of the Government subsequently ascertain that he has sworn falsely, his money and land will be forfeited; whereas in the matter of residence and cultivation, which vary so widely with the various surrounding circumstances and which involve questions giving rise to great diversity of opinion among different people, no matter how wise or honest they may be, the statute most wisely provides that these shall be determined finally and judicially upon com-

petent and sufficient proofs before the claimant is required to part with his money.

From the record in this case we must presume that the plaintiff was acting in entire good faith; that so far as the question of residence was concerned good intent was not wanting.

If the plaintiff failed in anything it was in the acts evincing that intent. It must be presumed that he believed these acts sufficient. He went before the tribunal which Congress had provided to pass upon and determine the question of whether his acts were sufficient. It may be supposed that he was aware of the contention that frequently arises in regard to this subject; consequently he set the time for making his proof more than six months prior to the date when his right to prove up would expire. If at that time the receiver and register had been of the opinion that his acts did not sufficiently evince his residence upon the land, then, as shown by the record in this cause, he yet had time enough within which to conform to their opinions on this subject. If their decision had been adverse to him at that time he could have returned to his land and within the six months following could have made his acts conform to their view of the subject in such a way as to leave no question about his residence. When he made his proof, however, he found that these officers concurred with him in the opinion that the acts which he had done and performed were fully sufficient to evince his residence. They so decided, and, in reliance upon their decision and the plain provisions of the statute, he paid his money, $400, together with land-office fees, took the receiver's receipt, purporting on its face to entitle him to a patent for the land, and continued to occupy the same and remain in possession thereof, and, as we assume, to pay the taxes thereon, until wrongfully ousted and ejected by the defendant. It must be apparent from a simple recital of these facts that the strongest reasons exist for the construction of this statute for which we contend.

Looking to the context we find strong support for our contention. Why should Congress make special provision for a contest between rival claimants and appeal therefrom if in all cases the supervisory functions of the department embrace the power to order hearings upon every question involved in the acquisition of lands and the power to cancel an entry for failure in any condition, even after a decision once rendered?

Revised Statutes, sec. 2273.

If the hearing of the final proofs of the pre-emption claimant is but an ordinary investigation by the register and receiver, as an executive and not a judicial act, and if it is subject to be revised or set aside at the pleasure of the superior officers of the department, why should Congress protect it by special legislative safeguards as they have done in the act of March 3, 1879?

1 Supplement to Revised Statutes, page 470.

We desire in this connection to call attention to certain characteristics or distinguishing features of the first decision of the register and receiver as shown by the record of this cause, which, we think, are sufficient to maintain that decision and give to it all the force and effect for which we contend and which are sufficient to distinguish the case at bar from those cases which will be cited by the defendant in opposition to our contention:

First. No attack is made upon the first decision of the register and receiver on the ground of fraud or mistake.

Second. It is not charged that the plaintiff was guilty of false swearing or that he procured any false testimony to be given upon that hearing.

Third. It is not charged that the proofs he offered were not competent evidence.

Fourth. It is not charged that any rule prescribed for this hearing was violated or infringed.

Fifth. It is conceded that the claimant was qualified, that the land was subject to entry, and that the tribunal had full jurisdiction in the premises.

Sixth. It must be presumed that the then acting Commissioner of the General Land Office was satisfied with the decision rendered and had no fault to find with it, because his attention was particularly called to the matter by the affidavit filed in his office about six months after the decision was rendered, and yet he took no action and ordered no further hearing until the expiration of his term of office.

Seventh. The decision which is set up in opposition to that upon which we rely was made by the successors of the officials who were then acting, made after the lapse of twenty-seven months from the time of the first hearing.

IV.

In the absence of fraud and mistake and in a case of which the register and receiver as a special statutory tribunal have complete jurisdiction, their decision to the effect that the residence and improvement of a pre-emption claimant complies with the requirements of law when regularly made in pursuance of the statutes and rules prescribed cannot be reversed, set aside, or annulled, nor can its effect be overcome by a subsequent decision of the same officers made at a hearing not authorized otherwise than by an order of the Commissioner of the General Land Office issued by him under the mere supervisory powers conferred on him by statute.

In support of this proposition we shall merely refer to the foregoing argument and authorities cited.

V.

Under the same conditions stated in the last proposition such a decision regularly returned to the General Land Office and never questioned by the Commissioner for over two years, notwithstanding his attention has been specially called thereto by an affidavit challenging the truth of the finding, cannot be set aside or overcome by the concurrent act of the successors of these officers in rendering a contrary decision at such subsequent hearing held twenty-seven months thereafter.

In support of this proposition we refer to the foregoing argument and also to a uniform line of decisions by this Court to the effect that one officer of the Land Department is not competent to cancel or annul the act of his predecessor. "This is a judicial act and requires the judgment of a court."

See Stone *vs.* United States, 2 Wallace, 525, and cases there cited.

VI.

If it should be conceded that plaintiff's right to and equities in the land in question do not rise higher than that of a mere naked possession, yet the defendant has not justified his invasion of plaintiff's possession.

As we have already stated, it is shown by the record of this case that the plaintiff has expended a large amount of labor and money in the improvement and cultivation of the land in controversy. He erected a dwelling-house, he paid $400, the cash purchase price therefor, and has also paid a considerable sum in land-office fees and expenses of making his final proof. If it should be held that this property is to be confiscated and forfeited, either on the ground that he innocently failed to do all the acts which in the opinion of the second tribunal called upon to decide the question were sufficient to evince his intention of residing upon the land or upon the ground that he failed to produce sufficient tes-

timony to prove what acts had been done by him at the second hearing summarily ordered by the Commissioner of the General Land Office, we contend that he at least was in peaceable possession of the premises, and that was sufficient to protect him against the assaults of a mere naked trespasser. How, then, does the defendant attempt to justify his invasion of plaintiff's possession? It is true he claims to have a receiver's receipt or patent certificate, but according to his contention this is of no value unless in point of fact he is entitled to the land. It is conceded on the record that he invaded the peaceable possession of the plaintiff and ousted and ejected the plaintiff therefrom. This must have been the initiation of his claimed right, if it ever was initiated at all; and it has been repeatedly held that such an act cannot initiate a right to Government land.

See Atherton *vs.* Fowler, 96 U. S., 513, and cases there cited.

Since writing the foregoing brief we have been served with a copy of the brief of defendant in error, and we confess our surprise at the palpable misapprehension of our contention which it discloses.

We trust we have been able to make ourselves better understood by the Court than by counsel in this brief and also in the petition for rehearing filed in the lower court.

See printed Record, pages 26–34, inclusive.

On page 30 of that printed Record the main proposition for which we contend is fairly stated; hence we cannot understand the elaborate argument of counsel against a supposed contention which is certainly not made in this case.

It will be observed that counsel concede in this Court, as they did below, that there was never any contest between rival claimants to this land in the Land Department.

The defendant in error was not a contestant, but was a mere informer.

See Brief of Defendant in Error, page 39.

We add, *ex abundanti*, that the claim of the plaintiff is not prejudiced by the circumstance that he was made a party to the second hearing before the register and receiver and appealed therefrom. No matter how great may have been his confidence in the title under the first proceeding, he had a right to take *all* chances of securing his property, and that without affecting the sincerity or the strength of his claim under any one of them.

This case seems also (in another point of view) to be the first in which a plaintiff in a court of justice has relied *simply* upon the position which (under the other circumstances and details above set forth) the original finding of the register and receiver has given him, he assuming that finding to be *prima facie* (not merely presumptively) an efficient substitute for all reassertion or reproof of the transactions in the case that justified such finding, and in which also a defendant has accepted that challenge by a *demurrer*. Such is the strength of the contention upon either side in the present record.

Upon the whole, we submit that this contention stands before the Court upon its own merits and is not prejudiced by previous decisions here.

As for any alleged or supposed practice in the Land Department to the contrary, we submit that this must be without weight, and, if such exists, should be changed. Besides, the weight of any such practice in relation to a case like the present must depend upon its occurrence in matters not merely of the general class of that, but precisely *upon all fours* with it—*ex. gr.*, not in litigation involving fraud or irregularity—or details like those before the court in the cases above noticed.

We submit, therefore, that there is error in the judgment under consideration.

W. H. Pritchard,
S. F. Phillips,
F. D. McKenney,
Attorneys for Plaintiffs in Error.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

GEORGE F. ORCHARD,
PLAINTIFF IN ERROR,
vs.
WILLIAM ALEXANDER,
DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

Filed this ..... *day of* ....., *1895.*

..... *Clerk.*

Lancaster

Attorney for Defendant in Error.

JOHN P. JUDSON and
W. C. SHARPSTEIN,
of Counsel for Defendant in Error.

P. T. HOUGHTON & CO., PRINTERS, TACOMA

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STATEMENT OF THE CASE.

The facts as disclosed by the pleadings in this action are as follows:

On August 17, 1881, the plaintiff in error filed his declaratory statement for the premises in controversy under the pre-emption laws of the United States. On July 9,

1883, the defendant in error filed upon said land under the homestead laws of the United States. While said filing of defendant in error remained of record in the office of the Register and Receiver the plaintiff in error made cash entry for the premises March 4, 1884, or more than thirty months after filing his declaratory statement.

On April 4, 1884, defendant in error filed affidavits with the Register and Receiver against the allowance of plaintiff's said cash entry upon the ground that plaintiff had failed to reside on said land and failed to cultivate and improve the same as required by law. On May 12, 1884, the Commissioner of the General Land Office ordered a hearing before the Register and Receiver on the affidavits and charges made by the defendant in error. On July 15, 1884, said hearing was had at which plaintiff in error appeared with his witnesses as did also the defendant in error. The evidence was taken and the matter fully argued by plaintiff in error, and after argument, and on November 15, 1884, the Register and Receiver found that plaintiff in error did not establish his residence on said land; that he failed to cultivate and improve the same and held his cash entry for cancellation. Plaintiff in error thereupon took an appeal from the decision of the Register and Receiver to the Commissioner of the General Land Office, and on November 17, 1885, the Commissioner affirmed said decision and further found that plaintiff's proof was fraudulently made. Again plaintiff in error took an appeal; this time to the Secretary of the Interior, and on November 30, 1887, the Secretary affirmed the decision of the Commissioner of the General Land Office, and December 13, 1887, the cash entry of

plaintiff in error was cancelled, and it was further ordered that the homestead entry of defendant in error covering the land should remain and stand intact. Thereafter and on June 21, 1889, defendant in error made final proof upon said homestead entry covering and embracing all the land described in the previous cash entry of plaintiff in error. On September 18, 1889, plaintiff in error commenced an ordinary action in ejectment against defendant in error, in the District Court, holding terms at Tacoma. To the complaint the defendant in error filed an answer denying the allegations of the complaint and set up by way of equitable defense the matters just detailed. To this answer plaintiff in error filed an amended reply in which he asserts that the proceedings of the Land Office after the 4th day of March, 1884, the date on which the certificate was issued, were wholly void for the reason that said officers had no jurisdiction whatever over the said land or the plaintiff in error. He also denies that the defendant in error, in the affidavit filed by him with the Register and Receiver alleged that the plaintiff in error failed to improve and cultivate said land as required by law or that said entry of plaintiff in error had been procured by fraud. This denial, however, leaves admitted the allegation in said affidavit that plaintiff in error had failed to reside on said land. He further denies that the decision of the General Land Office was affirmed by the Secretary of the Interior, except as to the finding of the the Register and Receiver and Commissioner that plaintiff in error had not made his residence upon said land. The pleadings therefore disclose the fact that the officers of the land department found as a fact that plaintiff in error had not made his residence upon the land for which

he procured the certificate of the Register and Receiver. It will be observed that in this case the defendant in error was actually residing upon the land at the time plaintiff in error made his proof. We make this remark because in the case of Pierce against Frace in which the same counsel are engaged, Frace acted as an informer merely and had no interest in the premises while in this case Alexander had actually filed upon the land and was residing upon the same at the time the plaintiff in error made his proof.

Defendant in error demurred to the amended reply of plaintiff in error because it did not state facts sufficient to constitute a defense to the equitable defense set up by defendant in error. The Court sustained this demurrer and plaintiff in error declining to amend, judgment was entered dismissing the action and for costs. From this judgment and from the order sustaining the demurrer plaintiff in error appeals.

POINTS OF LAW AND AUTHORITIES.

There are two issues of law raised by the pleadings:

FIRST:

Whether the Court had any jurisdiction of the subject matter of this action, and

SECOND:

Whether the officers of the land department had not jurisdiction to cancel the entry of plaintiff in error.

These questions involve practically the same argument,

but we propose to discuss them separately for convenience.

PRIOR TO THE ISSUANCE OF PATENT THE CONTROL AND DISPOSITION OF THE PUBLIC LANDS OF THE UNITED STATES IS VESTED EXCLUSIVELY IN THE INTERIOR DEPARTMENT OF THE UNITED STATES, AND NEITHER THE COURTS OF THE UNITED STATES OR OF THE SEVESAL STATES HAVE ANY JURISDICTION, EITHER DIRECTLY, BY INJUNCTION OR MANDAMUS AGAINST THE OFFICERS OF THAT DEPARTMENT, TO CONTROL OR DIRECT THEIR JUDGMENT, OR, INDIRECTLY IN ACTIONS BETWEEN INDIVIDUALS CLAIMING THE SAME LAND, WHICH SHALL, IN EFFECT, NULLIFY ANY DECISION OF SAID OFFICERS WITH RESPECT TO THE DISPOSITION OF SAID LANDS.

The provisions of the Revised Statutes as to the powers and duties of the officers of the land department are as follows:

THE Interior department is a branch of the Executive. Section 158.

"The Secretary of the Interior is charged with the supervision of the public business relating to the public lands. Section 441.

"The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties pertaining to the * * * sale of public lands of the United States or in any wise respecting such public lands, and also such as relate to private claims of lands and the issuing of patents for all grants of lands under the authority of the government. Section 453.

All returns relative to the public lands shall be made to the Commissioner of the General Land Office * * Section 456.

"All patents issuing from the General Land Office shall be issued in the name of the United States, and be signed by the President, and countersigned by the Recorder of the General Land Office; and shall be recorded in the Office, in books to be kept for the purpose. Section 458.

"It shall be the duty of the Recorder of the General Land Office, in pursuance of instructions from the Commissioner, to certify and affix the seal of the office to all patents for public lands. * * * Section 459.

"The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this Title, not otherwise specially provided for. Section 2478.

The provisions of the Revised Statute relating to pre-emptions are as follows:

"All lands belonging to the United States, to which the Indian title has been or may hereafter be extinguished, shall be subject to the right of pre emption, under the conditions, restrictions, and stipulations provided by law. Section 2257.

"The following classes of lands, unless otherwise specially provided by law, shall not be subject to the rights of pre emption, to-wit:

First—Lands included in any reservation by any treaty, law, or proclamation of the President, for any purpose.

Second—Lands included within the limits of any incorporated town, or selected as the site of a city or town.

Third—Lands actually settled and occupied for purposes of trade and business, and not for agriculture.

Fourth—Lands on which are situated any known salines or mines. Section 2258

"Every person, being the head of a family, or widow, or single person, over the age of twenty-one years, and a citizen of the United States, or having filed a declaration of intention to become such, as required by the naturali-

zation laws, who has made, or hereafter makes, a settlement in person on the public lands subject to pre-emption, and who inhabits and improves the same, and who has erected or shall erect a dwelling thereon, is authorized to enter with the Register of the Land Office for the district in which such land lies, by legal subdivisions, any number of acres, not exceeding one hundred and sixty, or a quarter section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land. Section 2259.

The following classes of persons, unless otherwise specially provided for by law, shall not acquire any right of pre-emption under the provisions of the preceding section, to-wit:

First—No person who is the proprietor of three hundred and twenty acres of land in any State or Territory.

Second—No person who quits or abandons his resipence on his own land to reside on the public lands in the same State or Territory. Section 2260.

"No person shall be entitled to more than one pre-emptive right by virtue of the provisions of section twenty-two hundred and fifty nine; nor where a party has filed his declaration of intention to claim the benefits of such provisions, for one tract of land, shall he file, at any future time, a second declaration for another tract. Section 2661.

"Before any person claiming the benefit of this chapter is allowed to enter lands, he shall make oath before the Receiver or Register of the land district in which the land is situated that he has never had the benefit of any right of pre-emption under section thirty-two hundred and fifty-nine; that he is not the owner of three hundred and twenty acres of land in any State or Territory; that he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself; and if any person

taking such oath swears falsely in the premises, he shall forfeit the money which he may have paid for such land, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, for a valuable consideration, shall be null and void, except as provided in section twenty-two hundred and eighty-eight. And it shall be the duty of the officer administering such oath to file a certificate thereof in the public land office of such district, and to transmit a duplicate copy to the General Land Office, either of which shall be good and sufficient evidence that such oath was administered according to law. Section 2262.

"Prior to any entries being made under and by virtue of the provisions of section twenty-two hundred and fifty-nine, proof of the settlement and improvement thereby required shall be made to the satisfaction of the Register and Receiver of the land district in which such lands lie, agreeably to such rules as may be prescribed by the Secretary of the Interior; and all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void. Section 2263.

The Secretary of the Interior has by virtue of this last section of the Revised Statutes at various times prescribed rules and regulations and given instructions to Registers and Receivers relative to entries in pre-emption cases and at the time that the Commissioner of the General Land Office ordered a rehearing as to the proof of plaintiff in error the following circular instructions were in force:

"Failure to inhabit and improve the land in good faith as required by law renders the claim subject to contest and the entry to investigation.

"Final proof in pre-emption cases must be made to the satisfaction of Register and Receiver, whose decision as in other cases is subject to examination and review by this office."

These provisions of the Revised Statutes indicate

clearly that when a person has complied with the conditions prescribed by law that he is to make proof of this fact to the satisfaction of the Register and Receiver in the first instance, but that their conclusion is not final but subject to the supervision of the Commissioner of the General Land Office. The determination of the Commissioner is judicial in its character. If he decides that the patent should issue he prepare the patent for execution and thereupon it is signed by the President and countersigned by the Recorder of the General Land Office and recorded. When this last act is completed and not till then the authority of the land department over the land named in the patent ceases. The patent is the only evidence of title which is authorized by Congress. The very essence of sovereignty lies in its non-liability to be sued. And the fact that the decision from which we shall presently quote deny the right of the Courts to compel the Commissioner of the General Land Office to issue a patent necessarily determines as matter of law that the land department has the exclusive jurisdiction of the public lands and of their control and disposition.

The first case of which we have any knowledge which has defined the effect of a patent is entitled

Bagnell vs. Broderick, 13 Peters Reports, 436.

On page 450 appears the following :

"Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the Federal Government, in reference to the public lands, declares the patent the superior and conclusive evidence of legal title ; until its issuance, the fee is in the government, which, by the

patent, passes to the grantee ; and he is entitled to recover the possession in ejectment."

The doctrine laid down in the above case has been followed by the Supreme Court of the United States and by the State Courts of every State, so far as we are advised, and but one Court in the country has controverted this doctrine, and that is the Circuit Court of the United States for the District of Oregon. As the case at bar involves questions of the greatest importance, and as the value of the land involved is considerable, we shall examine every case which has any bearing on the question ; and for this reason it will become necessary for us to extend the limits of this brief beyond what we ordinarily would were there not so much involved, and we trust that the Court will bear with us if we find it necessary to discuss questions which have been regarded settled for many years.

In the case of

Wilcox vs. Jackson, 13 Peters' Reports, 498.

Wilcox was an army officer in command of Fort Dearborn at Chicago. The action by Jackson was to recover a portion of the premises of the military post. The post was in possession and had been in the possession of the War Department from the year 1804, and while at various times the post had been discontinued the War Department had never relinquished its proprietorship in the lands. It appeared that during one of these periods when the property was not in actual use by the War Department that one Beaubean entered into possession of a portion of the premises included in this post, and filed upon the same as a pre-emption and subsequently a cer-

tificate of entry was issued to him. Beaubean subsequently conveyed the premises and Jackson claims under said grantee. The claim was made in that case as in this, that the issuing of a certificate was the conveyance of title by the United States, and that it was paramount to any other claim of title. The Court at page 516 in disposing of this question used the following language:

"We think it unnecessary to go into a detailed examination of the various acts of Congress, for the purpose of showing what we consider to be true in regard to the public lands, that with the exception of a few cases, nothing but a patent passes a perfect and consumate title. One class of cases to be excepted is where an act of Congress grants land, as is sometimes done in words of present grant. But we need not go into these exceptions. The general rule is what we have stated; and it applies as well to pre-emptions as to other public lands. Thus it will appear by the very act of 1836, which we have been examining, that patents are to issue in pre-emption cases This then being the case, and this suit having been in effect against the United States; to hold that the party could recover as against them, would be to hold that a party having an inchoate and imperfect title could recover against the one in whom resided the perfect title. This, as a general proposition of law, unquestionably, cannot be maintained.

But it is argued that a law of the State of Illinois declares that a Register's certificate shall be deemed evidence of title in the party sufficient to recover possession of the lands described in such certificate, in any action of ejectment or forcible entry and detainer; but the same law declares that this shall be the case, unless a better legal and paramount title be exhibited for the same. Upon the construction of the law itself it would not apply to this case, because the United States not having parted with a consumate legal title by issuing a patent, a better legal and paramount title was exhibited for the same. Where that was not the case, but the suit should be against any person not having the right of possession, or against a trespasser, these are the kinds of cases in which

it would seem to us, by the proper construction of the act, that it was intended to operate.

A much stronger ground, however, has been taken in argument. It has been said that the State of Illinois has a right to declare by law that a title derived from the United States, which by their laws is only inchoate and imperfect, shall be deemed as perfect a title as if a patent had been issued from the United States; and the construction of her own Courts seems to give that effect to her statute. That State has an undoubted right to legislate as she may please in regard to the remedies to be prosecuted in her Courts and to regulate the disposition of the property of her citizens by descent, devise, or alienation. But the property in question was a part of the public domain of the United States; Congress is invested by the Constitution with the power of disposing of and making needful rules and regulations respecting it. *Congress has declared, as we have said, by its legislation, that in such a case as this a patent is necessary to complete the title. But in this case no patent has issued; and therefore by the laws of the United States the legal title has not passed, but remains in the United States. Now if it were competent for a state legislature to say, that notwithstanding this, the title shall be deemed to have passed; the effect of this would be, not that Congress had the power of disposing of the public lands, and prescribing the rules and regulations concerning that disposition, but that Illinois possessed it.* That would be to make the laws of Illinois paramount to those of Congress, in relation to a subject confided by the Constitution to Congress only, and the practical result in this very case would be, by force of State legislation to take from the United States their own land, against their own will and against their own laws We hold the true principle to be this, that whenever the question in any Court, State or Federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."

In the case of

United States vs. the Commissioner, 5 Wallace Reports, 563.

the facts were that the holder of the certificate petitioned for a mandamus to compel the Commissioner of the General Land Office to cause to be prepared, signed, countersigned, recorded and issued a patent to him for the premises described in his certificate of purchase. The certificate was issued on a private entry. The return set up that another party had entered this same land under a pre-emption right prior to the entry of the relator and that the latter's certificate of purchase had been cancelled. The Court below refused the writ and the case on appeal to the Supreme Court of the United States affirmed the order of the Court below. In the course of the opinion on page 565, the Court says :

"Whether or not a mandamus will lie in any case to compel the issuing of a patent is a question not necessarily involved in this case. We have not therefore examined it and express no opinion upon it. We have found no case in which this power has been exercised. Patents are to be signed by the President in person, or in his name by a Secretary under his direction, and countersigned by the Recorder of the General Land Office."

This latter statement would seem to indicate very clearly that in no case would mandamus lie.

The case of

Gaines vs. Thompson, 7 Wallace Reports, 347,

discloses the following state of facts :

The Secretary of the Interior having directed the Commissioner of the General Land Office to cancel an entry under which Gaines and others claimed an equitable right

to certain lands in Arkansas, these last brought suit in the Circuit Court of the District of Columbia, praying that the Secretary and Commissioner should be enjoined from making such cancellation. The plea set up was that the matters contained in the bill were in exclusive control of the Executive Department of the Government, the Secretary and Commissioner representing the President, and that the Court had no jurisdiction or authority to interfere with the exercise of this power by injunction. The Court below sustained the plea, and on appeal the Court, by Miller, Justice, has this to say of the powers of the land office. After discussing the nature of the acts sought to be enjoined and distinguishing between those purely ministerial and those judicial in their character, the Court says, on pages 352-3-4:

"Certain powers and duties are confided to those officers, and to them alone, and however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, after the matter has once passed beyond their control there exists no power in the courts, by any of its processes, to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action. The reason for this is, that the law reposes this discretion in him for that occasion, and not in the courts. The doctrine, therefore, is as applicable to the writ of injunction as it is to the writ of mandamus.

"In the one case the officer is required to abandon his right to exercise his personal judgment, and to substitute that of the Court, by performing the act as it commands. In the other he is forbidden to do the act which his judgment and discretion tell him should be done. There can be no difference in the principal which forbids interference with the duties of these officers, whether it be by writ of mandamus or injunction * * *

"The action of the officers of the land department, with which we are asked to interfere in this case, is clearly not

of this character. The validity of plaintiffs' entry, which is involved in their decision, is a question which requires the careful consideration and construction of more than one act of Congress. It has been for a long time before the department, and has received the attention of successive Secretaries of the Interior, and has been found so difficult as to justify those officers in requiring the opinion of the Attorney General. It is far from being a ministerial act under any definition given by this Court.

The numerous cases referred to by counsel, in which this Court—after the title had passed from the United States, and the matter had ceased to be under the control of the Executive Department—has sustained the courts of justice in decreeing the equitable title to belong to the person against whom the department had decided, are not in conflict with these views, but furnish an additional reason for refusing to interfere with such cases while they remain under such control."

The next case decided by the Supreme Court of the United States where this same question was involved was an appeal from the Supreme Court of the State of California.

The case is entitled:

Hosmer vs. Wallace,

and is reported in

47 California Reports, 461.

As the opinion of the Supreme Court of California harmonizes with our view of the functions of the Land Department and of the Courts, we set it out *in extenso*, beginning at page 467:

"The plaintiff appeals, on the judgment-roll alone, from a judgment in favor of the defendant; and the only question before us is, whether on the pleadings and findings the plaintiff is entitled to the relief demanded. *The principal question in the case is, whether on the facts admitted by the pleadings or found by the Court, the action of the*

FOR LACK OF THE NECESSARY QUALIFICATION, OR BECAUSE OF HIS FAILURE TO PERFORM THE REQUISITE CONDITIONS, THE COMMISSIONER OF THE GENERAL LAND OFFICE WOULD BE WHOLLY POWERLESS TO APPLY THE PROPER REMEDY, BY SETTING ASIDE THE ENTRY AND RETURNING THE PURCHASE MONEY, UNLESS THERE SHOULD BE AN ADVERSE CLAIMANT, WHO BROUGHT UP THE CASE ON APPEAL. BUT IF THERE WERE NO ADVERSE CLAIMANT, IT IS CONTENDED, THE DECISION OF THE REGISTER AND RECEIVER WOULD BE ABSOLUTELY FINAL, AND THAT ON PAYING THE PURCHASE MONEY AND OBTAINING HIS DUPLICATE RECEIPT THE CLAIMANT WOULD THEREBY ACQUIRE AN EQUITABLE TITLE, WHICH THE COMMISSIONER OF THE GENERAL LAND OFFICE OR THE SECRETARY OF THE INTERIOR WOULD BE POWERLESS TO DIVEST BY SETTING ASIDE THE ENTRY, HOWEVER CLEARLY IT MIGHT APPEAR THAT THE CLAIMANT WAS NOT ENTITLED TO THE LAND. If the local officers were subject to no supervisory control in this respect, it is easy to see that the opportunities for fraudulent entries would be greatly multiplied, and that the land system would be capable of great abuses. It was, doubtless, in view of this fact, and to promote uniformity in the administration of the laws for the sale of the public domain, that Congress, by the act of July 4th, 1836, entitled 'An Act to Re organize the General Land Office,' enacted 'that from and after the passage of this Act the executive duties now prescribed or which may hereafter be prescribed by law, appertaining to the survey and sale of the public lands of the United States, or in anywise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States."

"THIS LANGUAGE IS SO EXPLICIT AS TO NEED NO INTERPRETATION IF ALL THE EXECUTIVE DUTIES APPERTAINING TO THE "SALE OF THE PUBLIC LANDS OF THE UNITED STATES, OR IN ANYWISE RESPECTING SUCH PUBLIC LANDS, ARE TO BE SUBJECT TO THE SUPERVISION AND CONTROL OF THE COMMISSIONER OF

THE GENERAL LAND OFFICE,' IT IS IMPOSSIBLE TO ESCAPE THE CONCLUSION THAT THE ACTS OF THE REGISTER AND RECEIVER, IN PERMITTING AN ENTRY OF A PARCEL OF PUBLIC LAND BY A PRE-EMPTIONER, ARE SUBJECT TO THE 'SUPERVISION AND CONTROL' OF THE COMMISSIONER, WHETHER THE MATTER BE BROUGHT TO HIS ATTENTION BY APPEAL OR OTHERWISE. HIS DUTY TO SUPERVISE AND 'CONTROL' THE ACTS OF HIS SUBORDINATES IS NOT MADE TO DEPEND UPON THE ACCIDENTAL CIRCUMSTANCES WHETHER THERE BE ADVERSE CLAIMANTS OF THE LAND. IF HIS AUTHORITY WAS THUS LIMITED, IT WOULD OPEN THE DOOR TO NUMEROUS FRAUDS ; AND, IN A LARGE CLASS OF CASES, THERE WOULD BE NO MEANS OF CORRECTING THE MISTAKES AND BLUNDERS OF INCAPABLE LOCAL OFFICERS. WE ARE SUPPORTED IN THESE VIEWS BY THE LATE CASE OF JOHNSON VS. TOWSLEY, 13 WALLACE, PAGE 72.

"We are, therefore, of opinion, that the Commissioner of the General Land Office and the Secretary of the Interior on appeal, had the jurisdiction to 'control' the action of the Register and Receiver in permitting the plaintiff's entry, and had lawful authority to set it aside if erroneous.

"*It remains to be considered to what extent the action of these officers may be reviewed in the courts. It is a rule resting on reason and authority as well, that in the absence of fraud, or fraudulent imposition on the officers of the land department, their determination of matters of fact is not open to review in the courts. Being a special tribunal to which the law confides the duty of deciding upon facts which are brought in question before them, their decision, if free from fraud, and not the result of a fraudulent imposition upon them, is final and conclusive. They may err in their judgment as to the weight of testimony, or may decide directly against the evidence.*

"But no appeal lies to the courts to correct such errors. (Johnson vs. Towsley, supra). If every disappointed applicant for the purchase of a quarter section of land could appeal from the decision of the Land Department to the Courts on controverted questions of fact, the delays would be most vexatious, and the litigation interminable. But these officers are not above the law, which prescribes a

rule of conduct for them, and to which their official acts, like those of all other executive officers are subject. If, on an admitted state of facts, they perform an act not authorized by law, the courts will redress the wrong or apply the proper corrective. The courts have frequently exercised jurisdiction in such cases and have reversed the action of the Land Department in awarding the land to one person, when the law awarded it to another, and that too, in the absence of any charge of fraud or imposition.

"But in the case at bar it does not appear, either from the pleadings or findings, what facts were proved before the Register and Receiver; the only averement in the complaint on this point being 'that he made proof of his said pre-emption claim and right under the laws of the United States of America, to the satisfaction of the Register and Receiver of the United States Land Office,' etc. The decision of the Register and Receiver, however, was not satisfactory to the Commissioner of the General Land Office who ordered them 'to investigate the entry and purchase of the north half of the north half of the said section one, made by the plaintiff,' and directed them to take such testimony as might be offered by the plaintiff and defendant respectively, and to report the same, with their decision thereon, to the Commissioner. This testimony was accordingly taken, but it does not appear what facts were proved on this second investigation. The decision of the Register and Receiver being again in favor of the plaintiff, was again disproved by the Commissioner, in respect to the land in controversy, and his decision was affirmed, on appeal, by the Secretary of the Interior. *For aught that appears in this record, the decision of the two highest officers of the Land Department at Washington, in rejecting the plaintiff's claim, may have turned wholly upon the question of the sufficiency or insufficiency of his proofs, to entitle him to pre-empt the land under the general pre-emption law. The proofs are not before us; and if they were, it is the exclusive province of the Land Department to decide upon the sufficiency or insufficiency of the evidence to establish the necessary facts. Nor do the pleadings or express findings negative the inference, that in the opinion and judgment of the Commissioner and Secretary, the plaintiff's proofs were insufficient to establish his claim under the general pre-emption*

laws. The only facts found or admitted by the pleadings on this branch of the case are, that the plaintiff made proof of his claim to the satisfaction of the Register and Receiver, and that the Commissioner on receiving information of the defendant's claim, ordered a reinvestigation of the plaintiff's claim; whereupon new proofs were taken, and another decision rendered by the Register and Receiver, in favor of the plaintiff, which was reversed by the Commissioner and Secretary, by whom the land was awarded to the defendant. THERE IS NOTHING IN THE RECORD TO REBUT THE INFERENCE, THAT THE DECISION OF THESE OFFICERS MAY HAVE PROCEEDED WHOLLY ON THE GROUND THAT IN THEIR JUDGMENT, THE PLAINTIFF'S PROOFS WERE NOT SUFFICIENT TO ESTABLISH THE PERFORMANCE OF THE NECESSARY ACTS TO ENTITLE HIM TO THE BENEFIT OF THE GENERAL PRE-EMPTION LAWS.

IN ORDER TO PRESENT A CASE OF WHICH A COURT OF EQUITY WOULD TAKE COGNIZANCE, IT OUGHT DISTINCTLY TO HAVE APPEARED THAT THE COMMISSIONER WAS MISTAKEN, NOT IN THE FACTS, BUT IN THE LAW OF THE CASE. AS WE HAVE ALREADY SEEN, HIS JUDGMENT ON THE FACTS CANNOT BE REVIEWED IN THE COURTS, IN THE ABSENCE OF FRAUD OR IMPOSITION, WHILST HIS DECISION OF QUESTIONS OF LAW MAY BE. THE PLEADINGS AND FINDINGS FAIL TO SHOW THAT THE ERROR, IF THERE BE ONE, OF THE COMMISSIONER AND SECRETARY, WAS NOT PURELY AN ERROR OF FACT, AND NOT OF LAW."

This case is peculiarly in point, if we leave out of consideration the question of contest. Under the supervisory powers entrusted to the Commissioner of the General Land Office, he ordered a hearing after the Register and Receiver had awarded the certificate. Upon this hearing the Register and Receiver held as before, yet notwithstanding this the Commissioner of the General Land Office and the Secretary of the Interior joined in cancelling the entry. In that case, however, it did not appear to the Court on what ground the entry was cancelled and in

absence of such showing the Court assumed it was on a question of fact as to whether the claimant had complied with the law. And the Court therefore refused to interfere, holding that a decision on a question of fact is conclusive unless attacked for fraud or imposition. In the case at bar it is admitted that all three tribunals, Register and Receiver, Commissioner of the General Land Office and Secretary of the Interior found in succession that plaintiff in error "at no time established his residence on the land embraced in his said cash entry." Now what is the inference to be derived from the finding? To have obtained the certificate in the first instance plaintiff in error must have introduced proof (?) to the effect that he had "established his residence on the land embraced in his said cash entry." The subsequent finding was made after a trial in which a well directed cross-examination probed into the facts, showed that he had not established his residence. Hence since there is no charge of fraud, perjury or the like, the conclusion is irresistable that plaintiff in error committed fraud in making his so-called proof.

On appeal to the Supreme Court of the United States the judgment of the Supreme Court of California was affirmed.

The case is reported in 97 United States, 575.

The latest decision from the Supreme Court of the United States is entitled:

United States vs. Jones, and is reported in 131 United States Reports, page 1, and also in 9 Supreme Court Reporter, page 669.

This case came on writ of error from the United

States Circuit Court for the District of Oregon, and was from the decision of Judge Deady. This is probably as opportune an occasion as we could find to discuss the various decisions of Judge Deady relating to the public lands. No one who has read his decisions but has been impresssed with the seeming eagerness of Judge Deady to decide against the Government in all cases arising out of the public land laws. We have not time here, nor perhaps would it be proper to make a list of these decisions, but we think a few of them may be mentioned with some profit.

Every one knows that the public lands of the United States are being stripped daily of the valuable timber on them, and it is also well known that the Government is constantly bringing suits against trespassers who have cut timber from these lands.

In a case entitled,

United States vs. Ball, 31 Federal Reporter 667,

Judge Deady announced this doctrine:

"That if a person having applied to purchase timber land but before receiving the certificate cuts and removes the timber therefrom and afterwards obtains a certificate from the Register and Receiver of his compliance of the law, the United States cannot thereafter maintain an action against him for damages for cutting such timber nor against any one to whom he may have disposed of the same for the conversion thereof."

Our own Supreme Court in the case of the United States vs. Kelly, 3 Washington Territory Reports 421, repudiates this doctrine; and holds very properly that the original taking being wrongful the subsequent conveyance of the land was no waiver of the right to sue for the conversion of the timber, and we have no doubt that the Supreme Court of the United States would so hold. The decision of the Supreme Court of this Terri-

tory is abundantly sustained by many of the Supreme Courts of the States. But to return to the case of the United States vs. Jones, Judge Deady in the same case reported in the

35 Federal Reporter 561,

held that the act of Congress providing for the bringing of suits against the United States for the recovery of money in effect was equivalent to permitting suits for specific performance against the Government to compel the issuance of a patent where a certificate had been issued.

On pages 562-3 he says:

"An applicant for land under this act (referring to the timber act) becomes the purchaser thereof when he makes the prescribed proof to the satisfaction of the Register, and pays the prescribed price therefor. When the certificate of purchase is issued to the applicant the land described therein becomes his property. The bare legal title is all that remains in the vendor in trust for the vendee; and if it was the case of a private person, a court of equity would compel him to perform his part of the contract, by executing and delivering to the vendee the proper conveyance thereof.

If it is claimed that the certificate was fraudulently or illegally obtained, the land department cannot arbitrarily, or at all, cancel the same or set it aside. The certificate, and the right of the purchaser thereunder, is property, of which he cannot be deprived without due process of law; and mere fiat law, by whomsoever pronounced, can have no such effect. Redress must be had in the Courts where such matters are properly cognizable, and where they may be heard and determined according to the law of the land—the law applicable to the rights and obligations of private persons under like circumstances."

And to support this doctrine Judge Deady cites his own decision in the case of

Smith vs. Ewing, 23 Federal Reporter 741,

a case to which we shall hereafter pay our respects.

At about the same date as the rendition of the decision

from which we have just quoted the Circuit Court of the United States for the Northern District of Iowa, after citing with approval cases from the Supreme Court of the United States, holds that this same act under which Judge Deady held that the Government could be compelled to specifically perform will not permit the issuance of an injunction to restrain the officers of the Land Department from allowing filings. That case is entitled

Sioux City and St. Paul Railroad Company vs. United States, 34 Federal Reporter 835.

On Appeal to the Supreme Court of the United States from the decision of Judge Deady in Jones vs. the United States, Judge Bradley says:

"These cases are suits in equity brought against the United States under the recent act of March 3, 1887, extending the jurisdiction of claims against the Government to the District and Circuit Courts of the United States. They are suits for specific performance, seeking to compel the United States to issue and deliver to the plaintiffs respectively patents for timber land, alleged to have been taken up and purchased by them under the act for the sale of timber lands in the states of California, Oregon, etc."

After discussing the provisions of this act and in concluding his opinion the Justice says:

"Of course, our province is construction only; the policy of the law is the perogative of the legislative department. But, notwithstanding the glowing terms in which able jurists have spoken of the progress of civilization and enlightened government as exhibited in subjecting government itself, equally with individuals, to the jurisdiction of its own courts, we should have been somewhat surprised to find that the administration of vast public interests, like that of the public lands, which belong so appropriately to the political department, had been cast upon the courts, which it surely would have been, if such a wide door had been opened for suing the government

to obtain patents and establish land claims, as the counsel for the appellees in these cases seem to imagine. We are satisfied that the door has not yet been thrown open thus wide."

To the same effect as the cases just cited are,

Marquez vs. Frisbie, 101 *United States Reports*, 473.

Litchfield vs. Register and Receiver, 9 *Wallace Reports*, 575.

Secretary vs. McGarrahan, 9 *Wallace Reports*, 298.

Many of the State Courts have in effect announced the same conclusion as that to which the Supreme Court of the United States has uniformly come. In an early case from the State of Mississippi, entitled

Dickinson vs. Brown, 9 *Smede's and Marshall's Reports*, 130,

the opinion of the Chief Justice on pages 135-6-7 is as follows:

"This was an action of ejectment for sixty-four acres of land, being part of Section No. 10, in Township No. 1, of Range 6, West. Brown, the plaintiff below, introduced a patent from the United States, for the land in question, dated 26th of April, 1843. The patent is not set out, nor is there anything to show the date of the entry on which it was made. To overreach this title, the defendant introduced a receipt from the Receiver of public money at Augusta, which is for the purchase money for the same land, dated 20th March, 1841. * * * As rebutting evidence, the plaintiff then offered the certificate of entry given by the Register on the above named receipt of the Receiver to Mathew Dickinson. The entry seems to have been made under the pre-emption law, and across the face of the certificate is the word 'cancelled.' To this is attached the certificate

of the Commissioner of the General Land Office, that it is a true and literal exemplification from the original on file in his office. To the introduction of this the defendant objected, but it was admitted. To prove that the cancellation was unauthorized by law, the defendant offered to introduce a correspondence between the land officers of this State and the Commissioner of the General Land Office in relation to Dickinson's right, of pre-emption. The Commissioner determined that it was good, and ordered the entry to be allowed, which was done. Brown being, as it would seem, interested, objected to the legality of the entry, and on his objection a further correspondence took place between the Land officers and the Commissioner, which resulted in an order to have testimony taken in regard to Dickinson's right, which was done, the result of which was that the Register and Receiver decided against Dickinson's right, and communicated their decision to the Commissioner, who approved it, cancelled the certificate, and directed the purchase money to be refunded. This evidence was excluded by the Court, because it did not prove that the certificate was cancelled contrary to law. * * *

"The plaintiff's patent was a legal title, sufficient to justify a recovery, without further or additional proof. The title set up by the defendant, was the certificate of the Receiver of public moneys, which was not in strictness even an entry; it was but an authority to enter. The entry is made with the Register, who gives a certificate But suppose this receipt is to be regarded as an entry, then, as against the Government is constituted but an equity. A Court of Chancery may give preference to a prior entry with a junior patent, because the equities alone are involved But is insisted that our statutes makes the certificate of the Receiver a legal title. It makes 'all certificates issued in pursuance of any act of Congress, by any Board of Commissioners, Register of a Land Office, or any other person or persons duly authorized to issue such certificate, founded on any warrant, or order of survey, or in right of any donation, pre-emption, or purchase from the United States, for any lands,' &c., a legal title, so far as to enable the holder to maintain an action thereon, and admissable in evidence as such. This statute makes the certificate but a substitute for a better

title. It does not profess to place it on an equal footing with a patent. The public lands belong to the United States, and Congress have declared what shall be the complete legal title. When that legal title passes it must be intrinsically superior to a mere entry. The State cannot say what mode the Government shall pursue in passing title. The certificate then, was the inferior title.

"BUT ADMITTING THAT IT CONSTITUTED A LEGAL TITLE, IT WAS IN PROOF THAT THE CERTIFICATE OF ENTRY HAD BEEN CANCELLED, AND WE CANNOT SAY THAT THE REGISTER AND RECEIVER, WITH THE APPROBATION OF THE COMMISSIONER OF THE GENERAL LAND OFFICE, HAD NO POWER TO CANCEL IT; ON THE CONTRARY, IT IS BELIEVED THAT SUCH POWER IS UNIFORMLY EXERCISED. TO A CERTAIN EXTENT THESE OFFICERS HAVE A DISCRETION IN SUCH MATTERS. THEY ARE EMPOWERED TO HEAR AND DECIDE ON AN APPLICATION FOR A PRE-EMPTION RIGHT. AS AGAINST THE GOVERNMENT, THE CERTIFICATE WAS BUT AN INCIPINET OR INCHOATE TITLE; THE OFFICERS DISCOVERED THAT IT HAS BEEN IMPROVIDENTLY ISSUED, AND CANCELED IT, and issued a complete legal title to another; and refunded, or offered to refund, the money paid; and it was competent for the plaintiff to prove this statement of facts."

Our own Supreme Court in the case of

Hays vs. Parker, 2 Washington Territory Reports, page 198,

in an opinion rendered by Justice Hoyt, says on page 202:

"This was an action of ejectment brought by the defendant in error, who alleged in his complaint that he was entitled to the land by virtue of a certificate of purchase issued by a receiver of Public Moneys of the United States. The defendant in the Court below, as a part of his answer, set up the existence of certain facts tending to show that said certificate was illegally issued; and that on account of such illegality, the Commissioner of the General Land Office had cancelled said certificate. The Court, on motion of plaintiff, struck out all that was

alleged in the answer as leading to the action of the said Commissioner in so cancelling said certificate ; and this, we think, was error, as in our opinion such allegations were proper by way of inducement, and defendant should have been allowed to prove them as matter of explanation of the Commissioner's said action.

"Besides, we think the letter of said Commissioner, offered in evidence by the defendant, should have been admitted, as tending to prove that the cancellation of said certificate and its exclusion was error, which entitles defendant to a new trial.

"*But we find from the evidence, that it appeared by the testimony of both parties that at the time this suit was commenced, the claims of the respective parties thereto to the land in question were being waged in the Department of the Interior of the United States ; and this fact being conceded, as we think it is by the record in this case, it was not proper for the Court to interfere to aid either party (by way of affirmative relief,) until the matter had been fully determined by the executive branch of the Government ; and upon this fact appearing to the Court, it should have dismissed the cause at the cost of the plaintiff ; and its refusal or failure so to do was error, for which the judgment and verdict must be set aside.*

These cases and others to which we shall have occasion to call attention later on hold in effect that until a patent is issued that the entire matter of the disposition of the public lands is subject to the control of the Land Department exclusively because until the patent is issued the Land Office may reverse its former decisions and the presumption as to public officers is that they will do their duty and issue the patent to the one who is rightfully entitled to it. So that although as between two parties applying for the same land the Department may in the first instance give the certificate to one, it may nevertheless and while the matter is within their control cancel this certificate and issue a certificate to the other

party, and notwithstanding this they may if they discover that they have been imposed upon by fraud and by concealment of the party to whom they last issued a certificate issue a patent to the man to whom they first issued the certificate. There is less reason for the interference of the Courts in this case than there was in any of the cases which have been brought in the Courts in which it has been held that the Courts could not interfere. In nearly all the cases which we have been able to find the complaints have contained charges of fraud either on the part of the successful party before the Land Office or on the part of the officers themselves. These charges of fraud are often times very strong and if in any case it would be proper for the Courts to interfere such a case where the Land Office has been imposed upon by the fraud of the successful party or where it itself had fraudulently allowed an entry would seem to be a case which would appeal very strongly to the interference of the Courts; but the Court will observe in this case that there is no charge made by the plaintiff in error He does not claim that the testimony by which his certificate was cancelled was perjured or that the officers of the Land Office acted fraudulently, he rests his case on the proposition that the Land Office after it had issued to him a certificate had no further duty or right in the premises but to issue him a patent. He admits that the defendant in error claimed in his affidavit that plaintiff in error at no time established his residence on the land. He admits that the Register and Receiver so found; that the Commissioner so found, and that the Secretary of the Interior so found. The finding was one of fact and is conclusive unless it is shown that the testimony by which

that fact was found was itself perjured. Counsel in his brief has some very plausible statements in regard to the hardships to which the party is subject in making contest before the Land Office. He thinks that because a party cannot have compulsory process to obtain the attendance of his witnesses, and because, as he says, "the oath administered to witnesses is not of such character as that perjury can be committed' is an insuperable objection to the Land Office exercising such powers. The plaintiff in error could not have been perjured in this regard for the rules of practice of the Land Department provide that testimony may be taken by deposition in the following cases :

1st. Where the witness is unable from age, infirmity or sickness or shall refuse to attend the hearing at the local Land Office.

2nd. Where the witness resides more than fifty miles from the place of trial.

3rd. Where the witness resides out of or is about to leave the State or Territory or is absent therefrom.

4th. Where from any cause it is apprehended that the witness will be unable or will refuse to attend.

These are substantially the same provisions as we have in our state statues and we have never understood that a party was not able to properly present his cause because required to take the testimony of any of his witnesses by deposition. Again the rules provide for continuances, which may be allowed on the day of trial on account of the absence of material witnesses, when the party asking for the continuance makes an affidavit before the Register and Receiver showing that one or

more of the witnesses in his behalf is absent without his procurement or consent; the name and residence of each witness; the facts to which they would testify, if present; the materiality of the evidence; the exercise of proper diligence to procure the attendance of absent witnesses; and that affiant believes said witnesses can be had at the time to which it is sought to have the trial postponed. In addition to this the rules provide that a motion for a new trial may be made before the Commissioner and we presume that the practice on such a motion is similar to that in Courts and that if the losing party is able to show newly discovered testimony that the Commissioner would remand the case to the Register and Receiver for the purpose of hearing such testimony. We think that the rules of the department allow a party every opportunity to preset his case fairly and without any obstruction to or abridgement of his rights. And it appears in this case that plaintiff in error had every right to which the law entitled him. He had a hearing before three different tribunals, every one of which concurred in holding that "he at no time established his residence on the premises embraced in his said cash entry." As to the question of the sanctity of the oath administered in such cases, we have no decisions to show whether false swearing would be perjury within the meaning of our statute, but we presume that where the law provides for the trial of any question that any statement made under oath or affirmation which is false is as much perjury as if the statute had directly provided for the administering of an oath in such case. In this case there is no allegation in the reply that plaintiff in error was prevented from having a fair trial before the Register and Receiver; there is

no allegation that he was prevented from obtaining the presence of his witnesses; nothing of this sort. The question is narrowed down to one of mere authority.

II.

The next question that presents itself is the one that counsel for plaintiff in error have so elaborately argued in their brief. We understand their contention to be that when a parly makes proof to the satisfaction to the Register and Receiver and as evidence of this fact they issue to him a certificate that neither the Register and Receiver nor the Commissioner of the General Land Office nor the Secretary of the Interior can cancel this certificate, suspend the entry or require additional testimony touching his entry or allowing a third party to contest his proof. We believe that this is the proposition weich counsel have labored so earnestly to sustain. We take issue with them on this question and assert as a proposition of law:

THAT UNTIL THE ISSUANCE OF PATENT THE COMMISSIONER OF THE GENERAL LAND OFFICE MAY SUSPEND AN ENTRY AND PLACE THE PRE-EMPTION CLAIMANT IN THE SAME POSITION THAT HE WAS PRIOR TO THE OFFERING OF PROOF; AND THAT ON SAID SECOND HEARING THE GOVERNMENT CAN ITSELF, THROUGH ITS OFFICERS AND AGENTS OR BY THE EFFORTS OF AN INFORMER RE-EXAMINE THE QUESTION AS TO THE PRE-EMPTION CLAIMANT'S COMPLIANCE WITH THE LAW, AND IF ON SAID HEARING IT IS SHOWN THAT THE CLAIMANT HAS NOT COMPLIED WITH THE LAW, THAT THE COMMISSIONER OF THE GENERAL LAND OFFICE MAY CANCEL THE ENTRY AND ALLOW ANY PERSON TO FILE A DECLARATORY STATEMENT FOR

THE SAME, AND AFTER COMPLIANCE WITH THE LAW PERMIT HIM TO ENTER IT.

Right here we desire to place before the Court what we believe the authorities lay down as law regarding the rights of a party holding a certificate issued by the Register and Receiver. We make this showing at this time because counsel have with much ingenuity so culled their authorities and their extracts from the authorities as to give an impression at first blush that a certificate is equivalent to a patent and that the issuance of a patent is a mere ministerial act which follows as a matter of course from the prior issuance of a certificate. Many of their cases arose at a time when lands were entered at private sale, where nothing but the payment of the Government price was necessary; when neither residence, cultivation or improvements were required. In such cases, it may perhaps be said with much reason that the Government having offered land at private sale is bound by a sale made by its authorized agents and that in such case the issuance of a certificate is equivalent to a patent, but in a case like the present where the Government bestows its bounty upon one who possesses certain qualifications and who performs the conditions precedent prescribed by law, that it is the compliance with these requirements that operates to divest the Government of its title and that where the conditions have not been performed, and a claimant through fraud and perjury makes facts seem to exist which do not in fact exist, that in such case the Government at any time may proceed ro cancel a certificate issued because of the fraud of the pre-emption claimant. Nor can a party complain of this right on the part of the Government to

choose its own time and tribunal for the ascertainment of the truth; it is the policy of the Government to encourage settlement, the tilling of the earth and the improvement and the developement of its resources, but while this is true it is also true that the Government does not offer this to those who will not accept its offer in the spirit in which it is tendered. It is to the *bona fide* settler that the Government offers this land If he has complied with the law no power on earth can prevent him from showing this fact, either in the Land Department or in the Courts. While it may be a hardship on him at times to be compelled to substantiate proof that he has already made still this is one of the inconveniences to which every citizen is subject. Where a man has not complied with the law but has by perjury made it to appear that he has complied with the law and the Government has issued to him a certificate it can upon discovering the fraud and imposition avoid its action, but the Government does not proceed in these matters oppresively or summarily. It offers to a party who has made this proof which is attacked an opportunity to meet such charges and to disprove them. It allows him, in case he is unsuccessful, an appeal to the Commissioner of the General Land Office and jealous of the rights of its citizens to have an impartial decision of matters in dispute; it permits an appeal to an officer who has heretofore had no part in the controversy, and not resting even here it vests in the chief executive, the President of the United States, the right to investigate the matter. The method of procedure in the land office is simple. The technicle requirements of the Courts of Justice are not found here. We think it may be safely said that the land office, in its prac-

tice, approaches more nearly to the practice of Courts of Equity than to any other practice. The public lands are divided into districts, in each of which a Register and Receiver are appointed. The district often comprises a domain covering thousands of miles. It is impossible, especially in this state where there is so much unoccupied land, and where the lands are so heavily timbered, for anyone connected with the Government to ascertain, in each case, whether the pre-emption claimant has complied with the law or not. He gives notice to the Register and Receiver that he is prepared to make his final proof, and he gives the names of his witnesses who are, generally, speaking, neighbors; the Register thereupon causes notice to be published, that the claimant will make his final proof on a certain day. When the day arrives a stereotyped set of questions is presented to him for answer. If the answers are satisfactory, the Register and Receiver issue him his certificate. Thereupon the proof is transmitted to the Commissioner of the General Land Office. If this transmission of proof is not intended for the purpose of allowing the Commissioner as supervisor to act as a check upon the Register and Receiver, then we are unable to perceive why it is required. While the matter remains in the hands of the Commissioner for his decision as to whether he will issue a patent or not, it is certainly competent for him of his own motion, or upon the suggestion of anyone, whether it be a special agent of the Department or a common informer, to order a rehearing. There is no fear that this power of supervision of the Commissioner of the General Land Office will be exercised in improper cases. In the rules which the Secretary of the Interior has prescribed, provision has been

made for contest only in certain cases, and these cases DO NOT embrace a contest by a party standing in the position of the defendant in error in this case. We do not place this action of the Commissioner of the General Land Office, in allowing a private party, having no interest in the matter, to contest the entry of the plaintiff in error upon any special provision of the statute, or even of the rules of the Land Department. We do not believe that the Land Department is compelled to recognize a common informer or to reward his efforts to disclose fraud and perjury by giving him a preference right to the land which has, through his efforts, been again thrown open for settlement. We do not desire to take any position before this Court which we cannot support. We desire to remove at this time any impression on the part of the Court or of Counsel that there is any claim on our part that this was a contest in the ordinary acceptation of the term, and as provided by the statutes and by the rules of the Department. We claim nothing more for the defendant in error in this case than that he was a common informer, or, as he is termed by the decisions, a "protestant," and in our opinion it would have made no difference so far as the plaintiff in error is concerned, that the defendant in error was qualified to enter lands under any of the laws of the United States or not. We do not claim that the defendant in error was a party in interest. All that we do claim for him is that he informed the Land Department that the plaintiff in error had, by the grossest fraud and perjury, imposed upon its officers. That while he had pretended to have complied with the law, he had not, in fact, done so; that the testimony by which he had made it appear, to the satisfaction of the Register and

Receiver that he had complied with the law, was a tissue of falsehood, and that but for this false testimony a certificate would never have been issued. This was drawn to the attention of the Commissioner in such a manner, although not provided for by law or by rule, that the Commissioner in his capacity as a supervising officer of the Register and Receiver, deemed it proper to lay these charges before the Register and Receiver, and while they were investigating the matter to suspend the cash entry of plaintiff in error. While defendant in error might have hoped, in case he was successful in having the entry of plaintiff in error cancelled, that he would be permitted to enter this land himself, still he had no guarantee that he would be thus allowed. In fact, we believe that if pending these proceedings a third party had established his residence upon the land in dispute, and had offered his declaratory statement, that in a contest between him and the defendant in error the Register and Receiver, and all the officers of the Land Department would have been compelled to have recognized said third party as having a prior right in the premises. Had the decision of the Register and Receiver been in favor of plaintiff in error, defendant in error could not have appealed. He was acting under the government and could not control the case.

Martin vs. Barker, 6 L. D., 763.
L. E. McGary, 12 Copps, L. O., 18.
James McCone, Id. 238.
Cerro Bonito, Q. M., 5 Copps, L. O., 3.

As a matter of fact, the defendant in error was allowed to make a homestead filing upon the land, and it is because of this allowance, that he is now the defendant in

this case. We believe that our position in this matter cannot be misunderstood; we have attempted to state it as clearly as language will permit, and we reiterate that this action on the part of the Commissioner of the General Land Office must be considered and taken as if defendant in error had never appeared in the matter at all. We proceed now to a consideration of the authorities which we believe sustain us in the position that we have taken.

In the case of

Frisbie vs. Whitney, 9 Wallace Reports, page 187,

the Court, at page 194, has this to say:

"The act of Congress on this subject, to which all the subsequent acts refer, and which prescribed the terms and the manner of securing title in such cases, is the act of September 4th, 1841. That was an act full of generosity, for it gave the proceeds of the sale of all the public lands to the States. The tenth section of the act provides that any person of the class therein described who shall make a settlement upon public lands of a defined character, and who shall inhabit and improve the same, and who shall erect a dwelling thereon, shall be authorized to enter with the Register of the proper Land Office, by legal subdivisions, one-quarter section of said land, to include the residence of the claimant, upon paying the minimum price of such land. Section eleven provides that conflicting claims for pre-emption shall be settled by the Register and Receiver; section twelve, that prior to such entry proof of the settlement and improvement required shall be made to the satisfaction of the Register and Receiver; and section thirteen requires an oath to be made by the claimant before entry; section fifteen requires a person settling on land with a view to pre-emption, to file within a limited time, a statement of this intention and a description of the land.

"*When all these prerequisites are complied with, and the claimant has paid the price of the land, he is entitled to a*

certificate of entry from the Register and Receiver; and after a reasonable time, to enable the land officer to ascertain if there are superior claims, and if in other respects the claimant has made out his case, he IS ENTITLED TO RECEIVE A PATENT, WHICH FOR THE FIRST TIME INVESTS HIM WITH THE LEGAL TITLE TO THE LAND."

In the case of

Harkness vs. Underhill, 1 Black Reports, 316.

it appeared that one Waters went out upon the land as a pre-emptor under the act of 1832; he put up what was styled a "pen" without any roof and in which he slept only one night. Waters offered to prove up and produced his own and the affidavits of other witnesses to the local Land Office tending to show residence, cultivation, etc., but his application to enter was denied upon the ground that the surveys were not extended over the land. Waters subsequently died without proving up and his heirs perfected the entry and obtained the usual certificates. Stillman subsequently informed the Commissioner of Waters' failure to reside upon and cultivate the land and thereupon the Commissioner instructed the Local Officers that if they believed the facts as respects the frauds practiced to obtain the entry in Waters' name to treat it as void for fraud and to allow Stillman's heirs to enter the land. The Register and Receiver cancelled the entry of the heirs of Waters and allowed the heirs of Stillman to enter the land. This is substantially such a case as is presented here. Counsel for the parties claiming from Waters contended that the Register and Receiver having sold the land to Waters in conformity with the instructions of the Commissioner of the General Land Office, had no further power or jurisdiction over it,

neither had the Commissioner of the General Land Office power to set aside the sale even for fraud, this could only be done by judicial authority. Counsel for parties claiming under Stillman contended that no one but a settler and a house-keeper on the land was entitled to a right of pre-emption under the act of April 5, 1832. Waters was not a settler or house-keeper. He had, therefore, no right—no title—nothing but a fraudulent claim, wholly worthless and void. That being its character, the Register and Receiver and Commissioner of the General Land Office had authority to rescind, set aside, and treat as a nullity the entry made by his heirs on the false proofs produced by him in his lifetime. As Waters' entry did not give him the title, it was still in the United States, and the Land Office was justified in permitting Stillman's heirs to enter it.

The Supreme Court agreed with Counsel who contended for the latter doctrine and say:

"The question is again raised, whether this entry, having been allowed by the Register and Receiver, could be set aside by the Commissioner."

"This question has several times been raised and decided in this Court, upholding the Commissioner's powers."

In the case of

Barnard's Heirs vs. Ashley's Heirs, 18 Howard's Reports, page 43,

the Court, on pages 44 and 45, says:

"In cases arising under the pre-emption laws of the 29th of May, 1830, and of the 19th of June, 1834, the power of ascertaining and deciding on the facts which entitled a party to the right of pre-emption was vested in

the Register and Receiver of the land district in which the land was situated, from whose decision there was no direct appeal to higher authority. BUT, EVEN UNDER THESE LAWS, THE PROOF ON WHICH THE CLAIM WAS TO REST WAS TO BE MADE 'AGREEABLY TO THE RULES TO BE PRESCRIBED BY THE COMMISSIONER OF THE GENERAL LAND OFFICE,' AND, IF NOT SO MADE, THE ENTRY WOULD BE SUSPENDED, WHEN THE PROCEEDING WAS BROUGHT BEFORE THE COMMISSIONER BY AN OPPOSING CLAIMANT. In cases, however, like the one before us, where an entry had been allowed on *ex parte* affidavits, which were impeached, and the land claimed by another founded on an opposing entry, the course pursued at the General Land Office was to return the proofs and allegations, in opposition to the entry, to the District Office, with instructions to call all the parties before the Register and Receiver, with a view of instituting an inquiry into the matters charged; allowing each party, on due notice, an opportunity of cross-examining witnesses of the other, each being allowed to introduce proofs; and, on the close of the investigation, the Register and Receiver were instructed to report the proceeding to the General Land Office, with their opinion as to the effect of the proof, and the case made by the additional testimony. And, on this return, the Commissioner does in fact exercise a supervision over the acts of Register and Receiver. This power of revision is exercised by virtue of the act of July 4, 1836, which provides 'that, from and after the passage of this act, the executive duties now prescribed, or which may hereafter be prescribed by law, appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands; and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States.' THE NECESSITY OF 'SUPERVISION AND CONTROL,' VESTED IN THE COMMISSIONER, ACTING UNDER THE DIRECTION OF THE PRESIDENT, IS TOO MANIFEST TO REQUIRE COMMENT, FURTHER THAN TO SAY THAT THE FACTS FOUND IN THIS RECORD SHOW THAT NOTHING IS MORE EASILY DONE THAN APPARENTLY TO ESTABLISH, BY EXPARTE

AFFIDAVITS, CULTIVATION AND POSSESSION OF PARTICULAR QUARTER SECTIONS OF LAND, WHEN THE FACT IS UNTRUE. * * *

"The case relied on, of Wilcox vs. Jackson, 13 Pet, 511, was an ejectment suit, commenced in February, 1836; and as to the acts of the Register and Receiver, in allowing the entry in that case, the Commissioner had no power of supervision, such as was given to him by the act of July 4, 1836, after the cause was in court."

In the case of

Hestres vs. Brennan, 50 California Reports, 211,

the Court, on page 217, says:

"The act of Congress establishing the Department of the Interior confers upon the Secretary the supervision of public business relating to several subjects, among which is that of the public lands. The Commissioner of the General Land Office is vested with authority to perform executive duties appertaining to the survey, sale, etc., of the public lands, 'under the direction of the Secretary of the Interior; and the subordinate officers of the Land Department are subject to the supervision of the Commissioner. (Revised Stats. U. S., Secs. 441, 453 and 2,478.) BOTH THE SECRETARY OF THE INTERIOR AND THE COMMISSIONER, IN REVISING THE ACTS OF THE SUBORDINATE OFFICIALS OF THE LAND DEPARTMENT, EXERCISE SUPERVISORY RATHER THAN APPELLATE POWER, IN THE SENSE IN WHICH THE TERM APPELLATE IS EMPLOYED IN DEFINING THE POWERS OF COURTS OF JUSTICE. The Secretary of the Interior, in the exercise of such authority, may approve, modify or annul the acts, proceedings and decisions of the Commissioner."

In the case of

Randall vs. Edert, 7 Minnesota Reports, 359,

the Court, in speaking of the powers of the Commissioner, on pages 363-4-5, says:

"Every one who purchases land from the United States by pre-emption or private entry, does so subject to the rules and regulations that govern the Land Department. All entries are made subject to the 'supervision and con-

trol of the Commissioner of the General Land office,' and all contests are decided by the local officers, subject to appeal. *An entry may be satisfactory to the Register and Receiver, and, when returned to and supervised by the Commissioner, be found defective in some material points, which will either suspend the issuance of the patent, or cancel the entry entirely.* And every decision of the local officers upon contested entries may be reversed by the upper office on appeal. All parties who purchase from a pre-emptor prior to the consummation of the entry take subject to the power of the upper office to confirm or cancel, the same that existed in relation to the original purchaser. In this case all that appears is, that Hammond, in July, 1855, pre-empted the land in dispute and sold the same to Mary Cressey, and that after several transfers, the land was purchased by the plaintiff on the seventh day of August, 1861, which was after the cancellation of the pre-emption entry; that Hammond's entry was cancelled by the General Land Office in August, 1858, as conflicting with the approved pre-emption claim of Jasper Gelhage; and that in August, 1861, a patent was issued by the United States for the same land to one of the defendants. The only inference that can be drawn from these facts is, that Hammond's entry was not in accordance with law, and that Gelhage had prior and paramount rights with which it conflicted, and that notwithstanding the entry was allowed by the local officers, it did not meet the approval of the upper office, which was essential to its validity. Every intendment must be made in favor of the officers having done their duty, when nothing appears to the contrary. We are bound to presume that the case went regularly from the local office to the upper, by return or appeal, and was there regularly acted upon."

And the Court next proceeds to show that the case of

Camp vs. Smith, 2 Minnesota Reports, 138,

and from which counsel for plaintiff in error have quoted so largely on pages 53, 55 and 56 of their brief, is not in conflict with the decision they are rendering, for they proceed to say:

"The plaintiff cites our decision in the case of Camp vs. Smith, 2 Minnesota, (155), to show that the title passed out of the United States at the time of the entry by Hammond, and that the department had no further control over it. The counsel has mistaken the nature of that decision. In that case, the pre-emptor conveyed the land, between the time of the entry and the issuing of the patent, but the entry was never disturbed, and was subsequently ratified and the patent issued to the pre-emptor. The question simply was, whether the deed made before the issuance of the patent was valid to pass the interest that the pre emptor had gained by virtue of his entry; we held that it was. Had the entry not received the confirmation of the upper office, the title would have failed, and the grantee been left to his covenants for redress. When, however, it was confirmed, the title passed to the pre-emptor's grantee by operation of the covenant of warranty in the deed. The essential difference between the case cited, and the one at bar, is, that in the former, the pre-emptor had conformed to the law and acquired rights under his entry, which passed to his grantee, and, in the latter, he had failed to acquire any rights, and, consequently, had none to transmit."

And in line with this decision is the case of

Gray vs. Stockton, 8 Minnesota Reports, page 472,

and the Court, on page 478, says:

"The issue of fraud is found against the defendants, so far, at least, as Elizabeth Gray is concerned, and there is no ground to disturb such finding on the evidence. Aside from this issue, the answer does not state facts snfficient to show that the legal title to the land ever vested in Howell, but, on the contrary, shows that he never did make a valid pre emption, and did not comply with the laws of the United States, in relation to pre-emptions, and consequently was never entitled to a patent, or in fact any evidence of title from the Government. By his own showing, the duplicate which he received from the local land officers at Winona, was improperly granted, and consequently it is unnecessary to consider what might have been his rights under such evidence of title and our

statute relating thereto, had all the requisites required by law to complete his pre-emption been complied with. The remarks and reasoning on the subject of the rights of pre-emptors, in Camp vs. Smith, 2 Minn. (156), upon receiving a duplicate, are all based upon the assumption that the pre-emptor has complied with the requirements of the pre-emption law. 'Every one who purchases land from the United States by pre-emption or private entry, does so, subject to the rules and regulations that govern the land department. All entries are made 'subject to the supervision and control of the Commissioner of the General Land Office, and all contests are decided by the local land officers, subject to appeal.' Randall vs. Edert, 7 Minn. (450.) And in the same case it was held, that 'all parties who purchase from a pre-emptor prior to the consummation of the entry, take, subject to the power of the upper office to confirm or cancel the entry that existed in relation to the original purchaser.' These views dispose of the material points in the case, and the judgment below must be affirmed."

The case of

Judd vs. Randall, also from Minnesota,

but reported in

29 Northwestern Reporter, 580,

is a somewhat peculiar case, and is, we think, entitled to a great deal of consideration by this Court, because the Court, while desiring to hold contrary to what it did, yet found that the practice of the Land Department had become so fixed and had been supported so strongly by the Courts that it felt constrained to follow this practice rather taan yield to its own feelings.

In that case it appeared that one Andrews entered the land as a homestead; that he made final proof and received his certificate and conveyed the land to Randall, and Randall conveyed to Judd; Judd conveyed to one Tuttle. Four years after the certificate had been issued,

one Bray presented to the Commissioner of the General Land Office an affidavit, and the Commissioner ordered a hearing before the Register and Receiver, upon the point as to whether the entry and final proof of Andrews had been fraudulent or obtained by perjury. Such a hearing was had and the evidence produced was reported to the Commissioner of the General Land Office by the Register and Receiver, with the recommendation that by them that the entry be cancelled, and the Commissioner ordered Andrews' entry and final receipt to be cancelled. The action arose on a claim for a breach of warranty. We desire to quote from the opinion of the Judge in that case:

"The conclusion of the learned judge now under review, denying a right of recovery, is based upon his decision that the action of the officers of the Land Department, assuming to annul and cancel Andrew's entry, and the proceedings resulting in that end, were unauthorized and void. The correctness of this decision is the principal question presented before us. If we were not constrained by the consideration to which we are about to allude, it is probable that our decision would be in accordance with that under view; but, without setting forth the reasons which lead our minds towards that conclusion, we will state briefly the grounds of our decision to the contrary.

"It has long been the practice of the Land Department, in administering the various laws for the disposition of the public lands, even after final proof and the issuing of the proper final certificate or receipt, and after the appointed proceedings with reference to making such proof have terminated, but before the issuing of a patent, to entertain proceedings anew, upon evidence produced before the Commissioner of the General Land Office, going to show that the entry had been fraudulently made and completed, to order an investigation, and, upon proof of fraud, such entries have been cancelled. Zabr. Land Laws, 505; 1 Copp, Land Owner, 123, 124; 2 Copp, Land Owner, 54; Copp, Land Laws, 221; 6 Copp, Land Owner, 189; Copp, Land Laws, 421-919; 11 Copp, Land Owner, 181;

12 Copp, Land Owner, 70, 158, 170, 226, 250, 265, 289; 13 Copp, Land Owner, 13.

"This practice seems to have been sanctioned by the Supreme Court of the United States, in Harkness vs. Underhill, 1 Black, 316, 325, and by this Court in Gray vs. Stockton, 8 Minn., 529 (Gil 472.) The record in the latter case shows that the hearing which resulted in the cancellation of Howell's entry was ordered by the Commissioner of the General Land Office some three years after Howell had perfected his pre-emption entry, and received his final certificate. It shows, also, that his proof before the land officers in April, 1885, by which his claim was originally established, included his affidavit that he had declared his intention to become a citizen of the United States.

"We feel that we are compelled, by these adjudications in support of the established practice, to affirm the existence of the power in question, until the subject shall be further considered by the Supreme Court of the United States, whose decisions concerning it are of paramount authority."

In the case of

Darcy vs. McCarthy, 12 Pacific Reporter, 104,

it appeared that Darcy had been permitted to enter certain lands and a certificate was issued to him. Subsequently it came to the attention of the Commissioner that the entry had been improperly allowed and he directed the Register and Receiver to cancel it; a new certificate was thereupon issued to McCarthy, and the Court in passing upon the question raised in that case, say, on pages 105–6:

"It is also claimed that the action of the Register and Receiver in allowing the cash entry of the plaintiff is conclusive on the Land Department, and that the Commissioner had no authority to do that which his letter attempted to do. Although proof of the right to enter land must be made to the satisfaction of the Register and Receiver, they are not the final arbiters of such right.

They make returns of entries of land to the General Land Office, which is under the charge of the Commissioner. That officer has supervisory control over the subordinate officers in the Land Department, and can revise and correct their decisions. The entry relied on by the plaintiff was allowed by mistake, and without authority of law, and it was clearly competent for the Commissioner to cancel and set it aside. Bellows vs. Todd 34 Iowa, 31. It seems that before the entry was made the plaintiff and defendant had both settled upon, and were seeking to acquire title to, this land. The plaintiff then claimed it under a homestead entry, but the defendant instituted a contest which resulted in the decision made October 30, 1882, cancelling the entry. Under an act of Congress, this gave McCarthy, the successful contestant, thirty days in which to enter the same land. 21 U. S. St. at Large, c 89, 2. During this time a preference was given to the defendant, which was availed of and exercised by him on November 11, 1882, when he made a homestead entry. This homestead entry gave the defendant the superior right, and barred the plaintiff from acquiring any right to the land until the entry was contested and cancelled. Notwithstanding this, the officers of the Land Department, through a mistake, permitted a filing to be made on the land by the plaintiff on December 12, 1882, in which he claims settlement on November 6, 1882. As the land had already been taken, and was not subject to entry by the plaintiff, this mistaken action of the officers gave him no right.

"*It is argued for the plaintiff that under section 383 of the Code his duplicate receipt is proof of title against all but the holder of the actual patent, which is not in the hands of the defendant. This is a rule af evidence prescribed by the Code, and is applicable in a controversy between citizens, where the duplicate receipt is held with the concurrence of the United States authorities.* The title to the public lands belongs to the United States, and Congress is given full authority to dispose of the lands, and to make all needful rules rnd regulations respectin3 the same. Sec. 3, Art. 4, Const. U. S. A Land Department has been created by Congress, and rules prescribed for the disposal of the public lands, and to the officers of that Department the duty of selling and disposing of the lands is committed. They can only sell or dispose of

these lands in the manner prescribed by Congress. In disposing of them there are doubtless many mistakes made, BUT THE MATTER IS WITHIN THE CONTROL OF THE LAND DEPARTMENT UNTIL THE PATENT ISSUES, AND THE MISTAKES MAY BE CORRECTED BY THE OFFICERS OF THAT DEPARTMENT. The entry of the plaintiff, having been made without authority, was rightfully cancelled and set aside by the Commisoner, and the effect of the duplicate receipt, the evidence of title, was destroyed. It being within the scope of the duties of the Commissioner to make the correction, and to cancel the erroeous entry, it will be presumed, in the absense of evidence to the contrary, that it was done in accordanc e with the rules governing such action, and upon sufficient evidence: His action left the whole matter before the Land Department of the government for adjustment, where the rights of the parties could be further contested, and an appeal from the decision of the Commissioner could be taken to the Secretary of the Interior. Whatever may be the status of the controversy between the parties there, it is plain, from the evidence in the record here, that the plaintiff was not entitled to recover."

There are many other authorities to the same point as those from which we have already quoted, and as we regard the principle for which we have contended as being firmly established we forbear to cumber the brief with any further quotations; we cite simply,

Morton vs. Green, 2 Nebraska Reports, 441.

Forbes vs. Driscoll, 31 Northwestern Reporter, 633.

Bellows vs. Todd, 34 Iowa Reports, 18.

Gray vs. McCance, 14 Illinois Reports, 343.

McLane vs. Bovee, 35 Wisconsin Reports, 27.

Figg vs. Hensley, 52 California, 299.

Shepley vs. Cowan, 91 United States Reports, 330.

Moore vs. Robbins, 96 United States Reports, 530.

Quinby vs. Conlan, 104 United States Reports, 420.

United States vs. Minor, 114 United States, 233.

Lee vs. Johnson, 116 United States Reports, 48.

Porter vs. Bishop, 6 Southern Reporter, 863.

United States vs. King, 22 Pacific Reporter, 498, and

Vantongeren vs. Heffernan, 38 Northwestern Reporter, 52 to 97,

in which is a review of all the authorities both federal and state on this point, and we feel that we might safely submit this cause on the argument of the Court in that opinion.

Counsel for plaintiff in error rely solely on the certificate as evidence of title. We have with great diligence searched through the Chapter in the Revised Statute relating to pre-emptions but have been unable to find any authority on the part of the Register and Receiver to issue such an instrument. Nor is there anything in the rules of practice of the department or in the instructions of the Secretary or Commissioner authorizing the issuance of such an instrument or recognizing the validity of it. This, we think, indicates clearly so far as the land department is concerned that the certificate itself has no value save as a receipt of the money paid by the pre-emptor, and not being authorized by any law it certainly cannot have any validity as a muniment of title save where the statutes of the states may give it such effect for the purpose of protecting a *bona fide* pre-emptor in the possession of his claim as against a trespasser. It is evident that this is the view taken of this certificate by our own legislature, for we find

"In actions affecting real estate such certificate shall be *prima facie* evidence that the title to the land mentioned or described in such receipt is in the person or persons named therein." Code sec. 433.

Counsel, however, claim that it is conclusive evidence of title as against every one but the United States for they do concede that in an action brought by the United States to cancel the certificate that it would not be conclusive evidence. The instructions issued by the department of the Interior to the Registers and Receivers under the provisions of section 2263 Revised Statutes provides among other things,

"That failure to inhabit and improve the land in good faith as required by law renders the claim subject to contest and the entry to investigation and cancellation." Instruction 54.

And also, "That final proof in pre-emption cases must be made to the satisfaction of the Register and Receiver, whose decision, as in other cases, is subject to examination and review by this office" Instruction 55.

Counsel for plaintiff in error claim that the issuance of a certificate and the allowance of an entry by the Register and Receiver is in the nature of a judgment, and the Revised Statutes not having provided for a contest where no filing has been made previous to the making of proof by the pre-emption claimant that that action of the Register and Receiver is conclusive, but this leaves out of view the repeated decisions of the Supreme Court of the United States that the Commissioner of the General Land office is clothed with a power of supervision over the acts of the Register and Receiver and would in effect prevent the government from seeing that the public lands were disposed of in the manner provided by law. We do not believe that we can better express the theory upon

which Congress proceeds in the disposition of the public lands than by saying that it is the compliance with every requirement provided by Congress that gives a claimant any standing before the department. It is the fact of compliance and not the appearance of compliance that Congress says is sufficient. If then a claimant has complied with all the requirements of the statute he is entitled to a patent, and if the department for any reason should refuse to issue it to him and should issue it to some third party then we believe that the claimant could upon showing these facts in Court procure a decree that the patentee holds the title in trust for him, because in such a case the Court would simply be doing what Congress had already said should be done; but if a claimant has not in fact complied with the law, but has by his oath made it appear that he has, and thereby procures the favorable decision of the Register and Receiver, the land department at any time before it has issued a patent, upon discovering that the claimant had not complied with the law, would have the same power to cancel the entry improperly allowed as would the Register and Receiver in the first instance had the same proof been made before them. The result of counsel's argument, if sustained in the present case, would be as follows:

The plaintiff in error did not comply with the law, and he was therefore not entitled to a certificate of compliance with the law, but by some means he obtained from the Register and Receiver a certificate based upon the assumption that he had complied with the law; it coming subsequently to the knowledge of the Commissioner of the General Land Office that the plaintiff in error had not complied with the law, a hearing was had wherein it

was determined as a matter of fact that plaintiff in error had not complied with the law. This in effect shut out plaintiff in error from obtaining the bounty of the Government. As against it he had no rights whatever. The land again lapsed into the public domain and was subject to entry by any person who should comply with the law. The defendant in error thereupon entered upon the land and obtained a certificate from the Register and Receiver showing his compliance with the law; upon receiving this certificate, however, the plaintiff in error brings an action in ejectment against him and obtains a judgment of the State Court that he is the owner of the land and not the defendant in error. Subsequently the Interior Department having ascertained that the defendant in error had faithfully complied with the provisions of the law, and was entitled to a patent issues it to him. The government to whom originally belonged the land has by its solemn act declared that the defendant in error is the owner of it, but the State of Washington who never had any interest in the land declares that the plaintiff in error is the owner of the land and refuses to entertain any action on the part of defendant in error to obtain possession of it. Here then is a direct conflict between the Government of the United States and that of the State of Washington. The party to whom Congress said the patent should issue cannot avail himself of this privilege, while the party to whom Congress said the patent should not issue and who obtained no interest in the land is nevertheless in the full occupation and enjoyment of it and is sustained by the Courts of the State. A moment's reflection, we think, will convince any one that Congress never intended that such a conflict of authority should occur, but

worse than this defendant in error in such case would be absolutely precluded from proving his right to the land because of the certificate held by defendant in error. He would therefore be deprived of his property without due process of law. But on the other hand observe the guards thrown around the action of the land office by the Courts when the land department shall have issued a patent to the defendant in error; plaintiff in error may by an appropriate action in the Courts of this State contest the right of the defendant in error to hold this patent, and he may show that he has become entitled to this patent himself because of his having complied with the law before defendant in error had. But in such case it would be necessary for him to show that his right was unquestioned, and that it was through a mistake or through fraud that the patent was not issued to him, because if it were upon a decision of a question of fact which was in dispute, then, we think, the decision of the Department would be conclusive upon the Courts. It is rather singular that no case like the present has ever been decided by the Supreme Court of the United States or by any State Court, and that the only cases on record, except those decided by Judge Deady, arose after the patent had been issued to one of the parties.

We now proceed to discuss the authorities upon which counsel for plaintiff in error has relied:

It is upon the faithful compliance with the conditions which it has prescribed that the Government agrees to part with its title to the public lands. If, therefore, a party has not complied with the law and the regulations made in pursuance of the law the Government is not required to convey the lands, and for the same reason if

by fraud a claimant imposes upon the Government it can whenever it discovers the imposition take steps to nullifiy what it has done. We make this statement here before proceeding to discuss the authorities cited by plaintiff in error because we believe that this far counsel will agree with us. For we understand that while conceding that the Government has some rights they insist that the proceedure adopted in the present instance was not warranted by law. Now, we have, as we think, satisfactorily shown that at any time before the issuance of patent the Land Office can rectify errors it has committed through mistake or imposition or fraud, and we shall therefore confine ourselves principally to this point:

The case of

Wilcox vs. Jackson, 1 Peters Reports, 498,

cited by the counsel on page 24 of their brief, is not an authority in favor of the plaintiff in error, for that case arose before the passage of the act of July 4, 1836, giving the Commissioner the power of supervision which he now enjoys. Nor in that case was there any appeal from the decision of the Register and Receiver in allowing a contested entry; the statute not having made any provision for an appeal, and, of course, what was said in that opinion was solely with relation to the law as it then existed, and we do not contend for a minute that the decision was wrong.

In the case of

Carroll vs. Stafford, 3 Howard's Reports, 441,

cited by counsel on page 28 of their brief, was a case of purchase merely and not one where the law required settlement, residence and cultivation. As we have before

remarked, it would seem in such a case that the payment of money being all that the Government required is sufficient to vest title, and that where an entry has been perfected that the Department could not set aside the action of the Register and Receiver, unless it was shown that the land so sold was not subject to purchase. In view of the facts and the law applicable to that case we think the Court correctly decided.

In the case of

Lytle vs. State of Arkansas, 9 Howard's Reports, 314,

cited in the brief of counsel at page 29, the rights of the parties were governed by the pre-emption law of 1830, by which law the powers of the Commissioner of the Land Office did not extend to the supervision of the Register and Receiver, and furthermore no appeal was allowed in any case from the Register and Receiver to the Commissioner.

In the case of

Simmons vs. Wagner, 101, United States Reports, 260,

cited on page 31 of counsel's brief, the facts show that the right of the party was one obtained by purchase, and not by settlement or cultivation, and the remarks we have heretofore made in regard to the case of Carroll vs. Stafford apply here with equal force.

The case of

Witherspoon vs. Duncan, 4 Wallace Reporst, 210,

cited on the brief of counsel at page 32, was a case where the power to tax public lands after entry had been con-

tested. We have been unable to discover anything in this case which sustains the contention of counsel. The taxing power of a State acts directly against the land, and if the Government has issued a certificate showing that the holder of it is *prima facie* entitled to a patent to the lands the State government has authority to tax these lands, because the State is authorized to assume that the occupant is holding in harmony with the United States and because otherwise the State would be deprived of the revenue. As was said by counsel for defendant in error in that case:

"With such rights under a certificate of entry, it would be strange, if the lands for which this certificate was given, should not be subject to taxation. If an individual could purchase lands of the United States, settle, improve and cultivate them, on certificates of purchase, then, in case, from the neglect and delay of the proper Department, the patents are not issued for several years, the lands would be exempt from taxation, while lands adjoining were compelled to pay taxes, though their occupant was deriving no greater advantage from the possession and cultivation. A period of sixteen years elapses, during which time a party might have improved and cultivated the land, derived a subsistance from it, accumulated property on it, and well nigh worn out the land, and yet, he must not pay taxes. Such a thing is possible, and easily to be done. And if this be the law, there is a great consideration held out to induce persons not to get patents issued at all."

And in addition to this Justice Davis, in considering the question of rights of parties claiming under a certificate of purchase, and a certificate obtained by reason of residence and cultivation:

"In either case when the entry is made and certificate given the particular land is segregated from the mass of public lands and becomes private property. IN THE ONE CASE THE ENTRY IS COMPLETE WHEN THE MONEY IS

PAID," (that is where it is purely a cash entry) "IN THE OTHER WHEN THE REQUIRED PROOFS ARE FURNISHED," (that is where evidence of residence and cultivation is required). "IN NEITHER CAN THE PATENT BE WITHHELD IF THE ORIGINAL ENTRY WAS LAWFUL."

that is to say, if in the first instance the land was subject to purchase and if in the second instance the claimant had complied with the provisions of the law as to residence and cultivation, the Government will not withhold the patent.

And further on in the opinion he says:

"The claim was allowed, the selections made, and a certificate of entry given, and it was their duty to see that the taxes were paid. It is true, that the entry might be set aside at Washington; but this condition attaches to all entries of the public lands."

If this language does not indicate that the Land office at Washington has a right to cancel an entry allowed by the Register and Receiver, then we do not understand its purport. It is so plain a proposition that a holder of a certificate is entitled to be considered the owner for the purpose of protecting his possession of the land embraced in his entry, that the various states have made enactments providing that a party holding a certificate of entry may maintain ejectment against any person claiming the land, but that this would be equivalent to saying that the holder of the certificate is the absolute owner of the land would be nullyifying the repeated decisions of the Courts, which hold that until the patent is issued the title remains in the United States, which, although it is termed the holder of the legal title this expression must be considered with reference to the question whether or not the entryman has previously complied with the law so as to

entitle him to the patent. It is the holding of the certificate with the concurrence of the Government that gives him this right. But when the government has destroyed his evidence of title then surely no Court has authority to treat him as the owner.

The case of

Cornelius vs. Kessell, 9 Supreme Court Reporter, 122,

cited on page 34 and so much relied upon by counsel is not in their favor.

It is a fundamental principle of our Government that a party cannot be deprived of any right unless he has had an opportunity to appear and defend; and so far as the Land Department is concerned this principle has become established as a rule. The rules of the Department provide, that where no appeal is taken from the decision of the Register and Receiver to the Commissioner of the General Land Office the decision of the local officers will be considered final as to the facts of the case, and will be disturbed only where fraud or gross irregularity was suggested upon the face of the papers, where the decision is contrary to existing laws, or where it is not snown that the party against whom the decision was rendered was duly notified of the decision and of his right of appeal.

In the case just mentioned the entry was a private one, and it also appears that a forty-acre tract which was subject to entry was included with an eighty-acre tract which was reserved from sale. The Commissioner of the General Land Office instead of cancelling the entry as to the eighty acres cancelled the entry as to the entire tract.

Justice Field, in the course of his opinion, says :

"That in October, 1887, an order was made by the Commissioner of the General Land Office cancelling the entry of Davidson for the two tracts of land on the alleged ground that one of them, not the tract embracing the premises in controversy, was included in a prior grant to the State, and therefore was not subject to entry. THE ORDER OF CANCELLATION WAS MADE WITHOUT PREVIOUS NOTICE OF ANY KIND TO DAVIDSON OR ANY PARTY IN INTEREST UNDER THE ENTRY, AND THE PURCHASE MONEY PAID WAS NEVER RETURNED OR OFFERED TO HIM OR TO ANY OF HIS SUCCESSORS IN INTEREST."

And the Justice also recognizes the power of supervision possessed by the Commissioner of the General Land Office over the acts of the Register and Receiver of the local land offices in the disposition of the public lands; and he holds that such power of supervision is not to be exercised arbitrarily, but "only when the entry was made upon false testimony or without authority of law; it cannot be exercised so as to deprive any person of land lawfully entered and paid for."

Now in this case three very important factors appear: First—The holder of the certificate was lawfully entitled to forty acres; the Commissioner, however, regarding the entry as an entirety, not only cancelled it as to that which could not be lawfully entered but also as to the other tract properly entered. Second—The order of cancellation was made without any notice to the holder of the certificate and he therefore had no opportunity to appear and defend as to that tract to which he had a valid right. Third—The entry was lawful and was not procured by fraud or perjury.

In the case at bar it is admitted that the Register and Receiver, Commissioner and Secretary found that plaintiff in error had at no time established his residence upon

the land embraced in his cash entry. This was a finding that he had not complied with the law and was therefore not entitled to the certificate which he had obtained by making it appear to the Register and Receiver that he had complied with the law.

Now, this finding is evidence that one of three things must have existed. Either the original proof of the plaintiff in error showed that he had not established his residence upon the land, in which case the Commissioner of the General Land Office in examining the proofs would have discovered this fact and returned the proof for the purpose of having the Register and Receiver require the attendance of the plaintiff in error at the Land Office to make additional proof; or the original proof made by plaintiff in error was false; or that the proof introduced by defendant in error at the trial before the Register and Receiver was false. If the first supposition is correct then we think counsel will concede that the Commissioner had a right to order a hearing and that on this hearing any party might appear and introduce proof to show that plaintiff in error had in fact not complied with the law as to residence, just as they might when he first offered his proof. If the second supposition is true, then under the decision of Cornelius vs. Kessel, the Commissioner had an unquestioned right to order a re-hearing, and if the third supposition is correct then counsel should have alleged in his reply that the defeadant in error had procured the cancellation of the certificate of the plaintiff in error by fraud and imposition. The truth of any one of these suppositions is sufficient to show that this Court has no jurisdiction in the matter and that the officers of the Land Office were the exclusive judges of the fact.

But in the case just mentioned the authority of the Courts was not invoked until after the issuance of patent. The Court must presume in this case that the testimony of plaintiff in error was false and fraudulent, because, although the finding of fraud is denied by plaintiff in error, still the fact nevertheless remains that the facts brought out on the re-hearing were at total variance with those made at the time of entry, and in the absence of any allegation that the facts found on the re-hearing were false the presumption naturally arises that those at the time of entry were false, and that therefore the proof was fraudulent and the plaintiff in error committed fraud.

The case of

Smith vs. Ewing, 23 Federal Reporter 741,

Cited by counsel on page 36 of their brief, is a peculiar case. The decision is by Judge Deady and the facts, as nearly as we can state them, are as follows: One Webb settled upon the land in controversy as a pre-emptor; made declaratory statement therefor and after due publication of notice, made his final proof of settlement and improvement to the satisfaction of the Register and Receiver, paid for the land and received a certificate of purchase; that one D. K. Smith purchased said land from Webb in good faith and for a valuable consideration, and subsequently the plaintiff purchased the land from said Smith. It also appears that Ewing settled on the premises prior to the settlement by Webb, filed his declaratory statement therefor, and after entry by Webb applied to the Register and Receiver to contest the claim of Webb Thereafter the Commissoner of the General Land Office ordered a hearing which was had before the

Register and Receiver; thereupon they decided that neither Webb nor Ewing had complied with the pre-emption law in the matter of residence, cultivation and improvements, and recommended the cancellation of the filings and entries of both of said parties by the Commissioner. Webb appeale l from this decision to the Commissioner, who affirmed the same, and from there he took the case to the Secretary of the Interior, who affirmed the decision of the Commissioner, and said filings and entries were canceled; that Ewing thereupon entered the land as a homestead; that this application was allowed and that he commenced to reside upon and cultivate said land as a homestead and has ever since continued to do the same. The same contention was made by the plaintiff in that case as here, and in many respects the facts in that case are similar to those here. Ewing had no interest in the land at the time that he instituted the proceedings against Webb, and the question in that case was as to the right of the Commissioner to cancel these entries without there having been a contest by a party having an interest in the land. Of course we have nothing to say to this decision further than it is not supported by authority. Judge Deady is not sustained in any of the statements which he makes and if the steps by which he is enabled to arrive at the conclusion he does are false, then, of course, by all rules of logic his conclusion is also false. After citing cases from the Supreme Court of the United States, holding that the issuance of a patent conveys the legal title, and that after its issuance all control of the executive department over the title ceases, he proceeds to claim that a certificate is on the same footing with a patent, notwithstanding the fact that all the authorities hold

that until the patent issues the legal title is still in the Government, and then he makes the astounding statement that the issuance of a patent is merely the exercise of a ministerial duty, although decisions of the Supreme Court of the United States have held that it was the exercise of a judicial discretion which could not be compelled by mandamus or restrained by injunction. We regard the decision as entirely unsupported by authority, and as a discussion of it involves the decision of the case at bar we may dismiss this decision with the remarks already made.

The case of

Wilson vs. Fine, 40 Federal Reporter, 52,

Is nothing more nor less than a [redacted] of what was said in the case of Smith vs. Ewing, and there as here the position is taken that after the issuance of the certificate all authority of the land department over the land and over the holder of the certificate ceases.

The case of

Camp vs. Smith, 2 Minnesota Reports, 138,

Cited by counsel, on pages 53 and 55, has been by subsequent decisions of the same State confined to the facts involved therein.

The case of

Perry vs. O'Haulon, 11 Missouri Reports, 585,

Cited by counsel, cannot, we think, be considered an authority for plaintiff in error. In that case it appared that Perry under some special act filed his claim with the recorder of land titles for 639 acres. A portion of this tract on which his dwelling stood was supposed to have

been confirmed to him by an act of Congress. A commission was appointed to examine into claims of a like character. Before any action of the board was taken on his claim Perry attempted to avail himself of the pre-emption privileges granted to claimants who were willing to relinquish to the United States. This act it seems provided for two classes of claimants. One class were allowed a pre-emption, provided they were actual settlers and housekeeper. Claimants of the second class were allowed a pre-emption whether actual settlers or not, provided they would waive their claims and relinquish to the United States. The Register and Receiver allowed Perry's entry for the land which did not embrace his dwelling; it being represented to him at that time by these officers that that tract was confirmed to him and no action was necessary to be taken by them. Subsequently the Commissioner of the General Land Office, without any notice, and upon the ground that Perry was not an actual settler upon the land, directed the cirtificate of entry to be cancelled. Subsequently a patent issued to the defendant. In the first place the Commissioner had no power to cancel an entry without giving a party an opportunity to appear and show cause. In the second place the Commissioner committed a mistake in supposing that Perry had filed uoon this land as a settler; the fact being that he had claimed it by virtue of a relinquishment of his claim under a previous act of Congress. We do not claim for one moment that if the case at bar presented the same state of facts but that plaintiff in error would be entitled to recover in this case, but in that case a patent had issued from the department by which the title of the Government had been divested and it was certainly com-

petent for a State Court to inquire into the matter, and if it ascertained that the certificate of Perry had been cancelled by a mistake of fact or of law it was perfectly competent for the Court to declare the holder of the patent the trustee for the person who had it primarily become entitled to it. The remarks made by the Court in that case as to the power of Courts and of the authority of the Commissioner of the General Land Office while being very broad in their scope must under the rules of construction be confined to the facts then before the Court.

The case of

Brill vs. Stiles, 35 Illinois, 305,

is not an authority for plaintiff in error. In that case it appeared that one Rockafeller under whom Brill claimed had purchased the land from the Government and had procured a certificate of purchase for the same. This was in substance a contract on the part of the Government to convey the land to the purchaser. Subsequent to the purchase the Commissioner of the General Land Office cancelled the certificate of purchase given to Rockafeller and one Soule under whom Stiles claimed entered the land and subsequently procured a patent to it. It did not appear upon what ground the Commissioner of the General Land Office cancelled the certificate of purchase. Under this state of facts we think the decision of the Court holding that the Commissioner of the General Land Office had no power to cancel the certificate of purchase and to issue a patent to another party whose claim was subsequent to that of the purchases is entirely correct. As the Court said, "a Commissioner of the General Land Office has no power to decree the rescission of

the contract. The purchase and sale of the land was a contract on the part of the Government which should have been consumated, and we think that the powers vested in the Commissioner of the General Land Office did not extend to the cancellation of the contract of purchase." The Court said, on page 309, "If the entry was authorized by law, the title passed to him (Rockafeller), subject only to be defeated by proof of a right of pre-emption, and if unauthorized, he acquired no title. But until it is shown to have been illegally made, or to have been defeated by proof of a pre emption, the certificate of purchase was evidence of an equitable right.

The case of

Cady vs. Eighmy, 54 Iowa Reports, 615,

simply involves the question of the rights of the purchaser of lands from the holder of a certificate against a grantee of the holder of a certificate after the issuance of patent. The Court very properly holds that the purchaser of the equitable title is entitled to the benefit of the legal title when the patent issues, and that the patent when issued enured to the benefit of the purchaser, and that the grantee after the issuance of patent obtained no title as against the first purchaser.

The case of

Arnold vs. Grimes, 2 Iowa Reports, 1,

discloses the following facts: Arnold first entered the land in controversy under the pre-emption act of 1840 and obtained a final certificate; then Chapman, who settled upon the land about the same time, after Arnold's entry, applied for leave to contest. After considerable correspondence, and after Chapman had notified the Commis-

sioner that Arnold had conveyed the land by deed, prior to his entry, which deed in fact, however, had been obtained by Chapman himself by fraud and duress, upon Chapman's letter, the Commissioner directed an inquiry, by the Register and Receiver, and, they finding such deed to have been made, the Commissioner cancelled Arnold's entry. Subsequently Arnold went to the Court and got the obnoxious deed set aside and declared null and void, as having been executed under duress. He then applied to the department to have his entry reinstated; but in the meantime Chapman had been allowed to enter the land, and patent had been issued to him. The department at first declined to interfere, and advised Arnold to go to the courts, saying the department would not have permitted Chapman's entry if the deed had been cancelled when he made application to enter the land. But patent having already issued to Chapman, it was not thought advisable for the land department to entertain further jurisdiction of the controversy. But, however, upon a further application by Arnold, the department, to protect him, issued a second patent and cancelled Chapman's patent. Upon this state of facts the Iowa court held that the junior patent, issued upon the prior certificate, must prevail. This is all this case decides. The equities were all with Arnold; the department had done all it could to re-instate Arnold's claim, and advised the action of the courts; and the Court of equity, enforcing the equitable rights of Arnold, seems to have validated the act of the department in issuing the patent to Arnold, rather than to have sought to invalidate its former acts." The ground taken by the Court in that case was that the act in force at the time the entry of Arnold's was allowed

permitted no appeal to the Commissioner of the General Land Office from the decision of the Register and Receiver. At that time the act of Congress conferring the power of supervision on the Commissioner of the General Land Office had not been passed, and so the decision of the Court in that case may be reconciled on that ground, but we do think that, notwithstanding this, the Commissioner had the power to revise the acts of the Register and receiver to the same extent as he now has; it being remembered always that the Commissioner simply directs the officers who heard the first proof to again examine into the matter and report their opinion to him. The action of the Commissioner not being arbitrary but based upon the report which the Register and Receiver make upon the hearing.

The case of

Sillyman vs. King, 36 Iowa Reports, 207,

is the same character of decision as Cady vs. Eighmy *supra*. The Court holding that a conveyance by a purchaser of land from the United States holding a certificate of entry or location before a patent is issued will pass the title to his grantee as against a subsequent purchaser claiming under the patent.

The case of

Moyer vs. McCullough, 1 Indiana, 330,

disclosed the fact that the party under whom plaintiff claimed had located the land in dispute with a military warrant, his entry was allowed and entered of record. In transcribing from the record to the plat an error was made by the Register, by means of which the land actually entered appeared vacant. Subsequently the defend-

ant's grantor entered the land and obtained a patent. The Court was correct in its holding that the land having been previously entered was not again subject to entry, and that the issue of the certificate and patent to defendant's grantor having been inadvertently made did not vest any title in defendant. This was a case of mistake which Courts will rectify.

The case of

Aldrich vs. Aldrich, 37 Illinois Reports, 32,

is the case of a cash purchase of land, and the Court there holds that the Government has no right at its own mere discretion and without just cause to cancel its contract of purchase; but if the Government officers cancel an entry the Courts will presume, in the absence of proof, that such cancellation was upon valid grounds; but if it affirmatively appeared that such cancellation was wrongfully made the Courts will disregard it. The facts were that one Joscelyn located a military bounty land warrant upon a quarter section; subsequently the Commissioner of Pensions canceled said warrant as fraudulent, and the Commissioner of the General Land Office canceled the entry made by means of the warrant, but afterwards the order canceling the warrant was rescinded by the Commissioner of Pensions, and the Court held that inasmuch as the cancellation of the certificate of entry was based upon the action of the Commissioner of Pensions in canceling the warrant under which the entry was made, that the reinstating of the warrant was in effect a reinstatement of the entry. After this last order had been made another party entered the land, received a patent for it, and the Court held that the land not having been subject to entry

at the time the holder of the patent applied to enter it, and the rights of the party who had entered the land under the military land bounty were prior to that of the patentee, that the patentee held the patent in trust for the party having the prior right.

The case of

Morton vs. Blankenship, 5 Missouri Reports, 340,

is a case where it appeared that the plaintiff's grantor had made his entry and received a certificate from the Register and Receiver for the land in dispute. Subsequently the defendant's grantor, who had filed on another piece of land, claiming that it was not the tract on which he had intended to settle, and more than nine months after the date of his original settlement the Commissioner of the General Land Office allowed him to cancel his first filing and to make filing on the premises in controversy, and subsequently the patent was issued to him. The objection was raised that the Commissioner of the General Land Office had no authority under the law in this case to allow a change of location; the application had not been made within the time limited by law, and because another party had already located on the land and obtained a certificate therefor, and because the mistake which the law permitted to be corrected was one in the numbers of the tract and not in the intention of the claimant. Defendant's grantor had actually intended to file on the land which he had designated; his error consisted in not knowing the exact boundaries of the tract; it was not a mistake in the true numbers of the tract intended to be entered, but a mistake as to the tract itself. The Court held that the Commissioner did not have the power

which he had assumed to exercise, and we think the Court was correct. The error of the Commissioner was an error of law, and we think after the issuance of patent that the party really entitled to it has a right to invoke the aid of the Court to set aside an erroneous decision on a question of law made by the Commissioner by which his rights had been invaded.

The case of

O'Brien vs. Perry, 28 Missouri Reports, 500,

involves the same state of facts as in the case of Perry vs. O'Hanlon *supra*; the decision in the latter case involves a discussion of the same facts as in the former case, and the remarks we made at that time apply equally well here; it subsequently reached the Supreme Court of the United States: 1 Black, 132.

The case of

Cornelius vs. Kessell, 58 Wisconsin, 237,

is a case to which we have already drawn the attention of the Court in a former part of our brief. The case then under discussion being reported in the reports of the Supreme Court of the United States and the facts involved being identical in both cases. For this reason we will not stop to again discuss the same facts.

The case of

Boyce vs. Danz, 29 Michigan Reports, 146,

shows that Boyce went into possession of the premises in controversy in February 1857; that at that time the land was public land of the United States subject to pre-emption; that Boyce was qualified except that he had never become naturalized or declared his intention so to do; on

March 5, 1857, he declared his intention in due form, but in the name of Bice, which he seems to have gone by, and on this same day he filed his pre emption claim to this land. On March 31, 1857, Danz entered the same land with knowledge of Boyce's occupation and claim. On March 1, 1858, Boyce paid for the land, having previously furnished proofs to the Register and Receiver to their satisfaction of his rights as a pre-emptor, and a certificate was issued to him. October 18, 1858, the Commissioner of the General Land Office required the Register and Receiver to procure additional proofs, but this requisition was never brought to the notice of Boyce. Three years later the entry of Danz was cancelled, but subsequently the Commissioner reinstated Danz and cancelled the entry of Boyce. During all this time, however, Boyce remained in possession of the land and made valuable improvements on it. The Court in that case held that the action of the Commissioner in cancelling the entry of Boyce was a nullity because no notice of this cancellation was given to him, and that he was entitled to the land because he had complied with the law, and the decision of the Commissioner that he had not was based upon his mistaken construction of the law. In that case the aid of the Court was not invoked until the patent had issued.

The case of

Streeter vs. Ralph, 13 Nebraska Reports, 388,

was a case where the entry was canceled by the Commissioner because the record showed that a prior filing had been made in 1863 for the same land. But, thirteen years had elapsed, during which time no claim had ever

been made under said filing, and the time for proving up had expired. No settlement or improvements had been made under the first filing, and no claim had ever been made under it, but because the same appeared uncanceled of record the Commissioner of the General Land Office set aside the entry of the party, subsequently settling the same, and apparently without any notice to him. The Court held that the action of the Commissioner was wrong, in which decision we heartily concur. That case presents an entirely different state of facts from the one at bar. There was no claim made there that the man whose entry had been canceled had not complied with the law, but simply that the filing made twelve years before remained uncanceled. Of course, we know that under the homestead law the party is required to make proof within seven years from the date of settlement, and not having done so it is the duty of the Register and Receiver to cancel the filing; so that the action of the Commissioner in that case was palpably erroneous.

The case of

Baty vs. Sale, 43 Illinois Reports, 35,

was a case where Baty had settled upon a tract of land in controversy, and had filed an application for pre emption upon the same. After this the land office at which the filing had been made was discontinued, and the Commissioner of the General Land Office directed that all parties who had previously made filings should within thirty days after the new office was open renew their filings. This Baty did not do, and subsequently made final proof and received a certificate for the land; and afterwards Sale, while Baty was in possession, entered the land and re-

ceived a certificate of purchase, and a patent was issued to him. Baty's certificate was subsequently canceled after a hearing, because the land having been temporarily withdrawn by reason of the discontinuance of the land office, the Commissioner held that it was necessary to renew the filing after the new office had been opened, and this Baty not having done must be deemed to have abandoned the land. The Court holds that the discontinuance of the land office did not work a withdrawal of the land already filed upon, and that the action of the Commissioner in requiring a renewal of the application was unauthorized. That case is not a parallel one. It did not involve the question of performance of the statutory requirements by the entryman, and the matter was not litigated in the Courts until the control of the land office by the issuance of the patent had ceased. The only other case cited by counsel is the case of

Camp vs. Smith, 2 Minnesota Reports, 141,

but as we have quoted from decisions of a later date from the same Court distinguishing this case, we will not repeat what the Court there said.

The cases cited by counsel on pages 59 and 60, from the land office, with but one exception we have been unable to find, but even if they sustain the text of the brief we do not see how in this case they can be of any assistance to plaintiff in error. We have disclaimed any right on the part of the defendant in error to initiate a contest in this case, because he was not a party in interest, but was a stranger to the land, and as we before said, the land department need not have recognized him if it had chosen not to do so, but having recognized him his

actions thereafter in the matter were merely those of an informer acting for the Government and not, strictly speaking, of a party in interest. The other decisions are cited to sustain the proposition that the pre emptor has the full period of thirty months after making his declaratory statement within which to comply with the law and make final proof. Had this contest been initiated at the end of six months from the time of filing declaratory statement, and had plaintiff in error continued to reside upon, improve and cultivate the land as the law required, and a contest had been initiated and his entry contested because he had not complied with the law during the six months, we think that he would have had a right to show that he had subsequently complied with all the requirements of the law, and at the end of the thirty months would have been entitled to have made additional proof; but in this case nearly twenty-seven months had expired after plaintiff in error filed his declaratory statement before he offered to make his proof, and it was not until after thirty-one months from the time of filing the declaratory statement that the defendant in error called the attention of the Commissioner of the General Land Office to the fact that plaintiff in error had not complied with the law, so that plaintiff in error could not at that time have availed himself of the right which he insists should be allowed, because independently of a contest his right to make proof expired before defendant in error took any action whatever.

After the examination of all the authorities cited by us and those cited by counsel, and judging the decision in each case by the facts as disclosed in the decision, we do not see any difficulty as to what the decision of this

Court should be in this case. We venture to say that with the exception of the two cases decided by Judge Deady every case upon which counsel for plaintiff in error has relied can be placed in one of two groups. In the first group may be placed those where it appears that the land was offered for sale by the Government at a specified price, which price was paid and a certificate entitling the purchaser to a patent was issued. In all of these cases the Courts have uniformly held that the contract was one of bargain and sale and that the Commissioner of the General Land Office had no authority to cancel such a certificate where the land was subject to purchase. In the other group may be placed those cases where it appears that the entry was set aside without any notice to the holder of the certificate; and where it also appears that the action of the Commissioner of the General Land Office was based upon a mistake of fact or upon a false construction of the acts of Congress. In such cases the fundimental principle of our Government that every citizen has a right to be heard in any matter affecting his interest, and that he is not concluded by any adjudications of his rights in any proceeding to which he was not a party, and in which he had no opportunity to be heard; but in such cases while Courts will, upon proof that no notice was given, examine into the question to ascertain whether the action of the Commissioner was warranted by the facts or by the law, still in no case cited by counsel for plaintiff in error, with the notable exception of Judge Deady's cases, and in none which we have cited, have the Courts acted until after the issuance of a patent from the Government; not even in cases where the land had been purchased; but without exception the patent

had issued before the intervention of the Courts was sought. Now it is a somewhat remarkable circumstance that during all the years since the first pre emption act was passed and during which years actions have been brought in nearly every State for the purpose of annulling the acts of the land department that in no case has this attempted to be done until after a patent had issued to one of the parties claiming it. Counsel have made a very ingenious arguement as to the hardships to which the holder of a certificate is subject by the action of the land department in a case of this character. While in many cases this plea might be entitled to some weight it is in the case at bar peculiarly out of place, and we are surprised that counsel should attempt to make suggestions as to possible hardships, when the facts as found by the officers of the land department exhibit the most glaring and brazen attempt on the part of the plaintiff in error to procure title to land when he had never complied or attempted to comply with the law under which he claims the right to hold this land. But we notice that counsel are very careful to qualifiy their remarks and that they do not attempt to say pointedly that their client has been injured in any respect. Thus, on page 60 of their brief, they say, "And if all contestants be required to appear at some time within the period thus fixed he would be able, if he were honest and if he has really complied with the law, to establish the facts before the Register and Receiver," and we might add, that if he were honest and if he had really complied with the law that it would be possible for him at any time to prove these facts. And again on pages 60 and 61: "It is evident that a contest at the time of making final proof

does not therefore work any hardship to the settler, for if he is honest and if he has complied with the law he can ordinarily establish the necessary facts to secure his rights, and it is clearly the intention and spirit of the land laws of the United States to confer a benefit upon the *bona fide* settler, and the punishment and penalties provided for by these laws are all aimed at dishonesty, fraud and perjury." Is it a hardship upon a man who has never complied with the law and who is attempting to obtain that to which he has no right to make him appear at any time and subject him to an examination as to the manner in which he has attempted to defraud the Government? If it is then every rogue may well plead the hardships which a just law imposes upon him. Again counsel say: "It cannot be claimed upon the records of the case at bar that any charge of making false statements in his final proof either by himself or his witnesses has ever been made against Orchard, or sustained by the department." This is what the Commissioner of the General Land Office said upon the appeal to him by plaintiff in error: "The conclusion is irrestible that Orchard has failed to comply with the legal requirements as to valid settlement, *bona fide* residence or substantial improvements; there is a palpable attempt to acquire the land by doing, not as much, but as little as possible, from the time he initiated his claim, and every subsequent act to the time of making proof and the allowance of entry after which he immediately vacated it and took up another government tract, under the guise of the homestead entry, but as quickly as possible secured patent therefor by converting it into a cash entry. There is a conspicuous absence of that good faith contemplated by

law, and I, therefore, see no reason for disturbing your decision." As we have before remarked, fraud is a question which is determined by the facts. It is a conclusion of law. When the officers of the land department found that plaintiff in error had not complied with the law, they must of necessity have found that his former proof making it appear that he had complied with the law was fraudulent or that his former proof did not of itself entitle him to the certificate. On page 62 counsel concedes the right of the Government through its agents and the right of a third party to appear at the time the pre-emptor is making his proof and break down the proof, or by the production of other witnesses to defeat him. When counsel has conceded this, we think he has conceded his entire case, for by virtue of the power of supervision lodged in the Commissioner the plaintiff in error had never completed his proof The mere issuance of the certificate was in effect nothing more or less than an assurance by the Register and Reciver to plaintiff in error that "in case your proof is found sufficient by the Commissioner of the General Land Office this certificate will entitle you to a patent from him," and as we have before remarked, the fact that the law does not authorize the issuance of a certificate, and that the patent is the only instrument which is recognized by the statutes shows conclusively that nothing but the patent itself should be evidence of the right of a claimant to the public lands. Counsel are in a anomolous position: They claim that the issuance of the certificate by the Register and Receiver to plaintiff in error divested said officers and the entire land department of any further authority in the matter. This because the proceeding by which the cer-

tificate of plaintiff in error was canceled was not authorized by any law of the United States, and yet they have failed to point to one single section or provision of the Revised Statutes which authorizes the issuance of that very certificate which they claim is paramount. If the Register and Receiver assumed to issue that which the statutes did not authorize or recognize it must have been by virtue of some regulation of the department, and if a regulation of the department or if issued without authority of law, then it was within the power of the Commissioner to cancel it, because it had no validity at law. But if counsel concede the power of the Register and Receiver to issue the certificate it must be because the Secretary of the Interior, by virtue of Section 2,263, which directs "proof to be made to the satisfaction of the Register and Receiver agreeably to such rules as may be prescribed by the Secretary of the Interior," and the further provision, Section 453, giving the Commissioner of the General Land Office authority "to perform all executive duties pertaining to the sale of public lands or in any wise respecting them and for the issuing of patents for all grants of land under the authority of the Government," and the further provision, Section 2,478, that "the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution by appropriate regulations every part of the provisions of this title not otherwise provided for," authorized the issuance of such a certificate, and if he had power to authorize the issuance of a certificate, then certainly he had the power to declare that this certificate might be canceled in case it was improperly or inadvertly issued. It seems to us that the

logic of this statement is incontrovertible. The contention of counsel that notwithstanding the fact that the officers of the land department may know that a so-called entryman has not complied with the law under which he holds a certificate they must nevertheless issue to him a patent, seems to us a most remarkable one. The claim that is made that the proceeding before the Register and Receiver at which plaintiff in error's certificate was held for cancellation was not authorized by the statutes or even by the rules of the department, and that therefore the testimony of witnesses taken in opposition to the proof made by plaintiff in error could not be attacked because of perjury and the witnesses themselves subjected to criminal prosecution is one to which we have before adverted, but we are satisfied that before closing this brief we should call the attention of the Court to some of the provisions of the Revised Statutes.

Section 2,246 provides:

"The Register or Receiver is authorized, and it shall be their duty to administer any oath required by law or the instructions of the General Land Office, in connection with the entry or purchase of any tract of the public lands."

Section 2,478 provides:

"The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for."

Section 5,392 provides:

"Every person who, having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposi-

'tion or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment at hard labor not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any Court of the United States until such time as the judgment against him is reversed."

The question now is, was the oath administered to witnesses at that time required by law or instructions of the General Land office in connection with the entry or purchase of any tract of the public lands? Keeping in mind the power of supervision lodged with the Commissioner and his authority to return the proof for the purpose of requiring addition l testimony or the re-examination of the claimant and his witesses and the right of any person to appear on behalf of the Government and interpose objections and testimony in opposition of that of the claimant, we think it evident that a false oath made by any person, whether on behalf of the claimant or in opposition to him, would be perjury within the meaning of the Revised Statutes. There is no provision in the rules of practice in a case of contest even for the administration of an oath, so if counsel's contention is correct that a contest by a party in interest should have been initiated, plaintiff in error would not have been protected from the admission of false testimony.

This question of jurisdiction is in a measure raised by our demurrer to plaintiff in error's reply, but the real ground of the demurrer in the Court below was that the reply did not state facts sufficient to constitute a defense. The plaintiff in error admits that the Register and Receiver, Commissioner of the General Land Office, and the

Secretary of the Interior found that he had at no time established his residence upon the land embraced in his said cash entry. This was a finding of fact. It was the point in controversy before the land department and the finding of the officers of that department that he had not established his residence upon the land determined the question as to whether he had complied with the law. Of course if counsel concede that the land department had jurisdiction to make this finding then it results that the finding is exclusive on the Court, unless impeached for fraud. Now, no allegation is made, nor is there a suggestion of fraud, either on the part of defendant in error, or on the part of the officers of the land department. We assumed in the Court below that the land department had exclusive jurisdiction of this matter and that its finding was conclusive on the Court and for that reason there having been no allegation of fraud on the part of defendant in error in procuring the cancellation of the certificate of the plaintiff in error or of fraud on the part of the officers of the land department in canceling the entry that the reply did dot state facts sufficient to constitute a defense. Many of the authorities we have cited sustain this view, and we have not thought it necessary to make any argument on this point because of the well established principle that a finding of fact by a Court having jurisdiction of the subject-matter and of the parties is conclusive on the same parties in whatever Court the same question may again be litigated. We cite simply, as bearing directly upon the proposition first announced:

Plummer vs. Brown, 12 Pacific Reporter, 464, and cases therein cited,

Vance vs. Burbank, 101 United States Reports, 514,

Baldwin vs. Stark, 107 United States Reports, 463.

Johnson vs. Towsly, 13 Wallace Reports, 72.

Steel vs. Smelting Co., 106 United States Reports, 447.

And in conclusion we feel that we cannot do better than to close our brief with a quotation from the case of

Vantongeren vs. Heffernan, 38 Northwestern, Reporter, 52 to 79.

In that case plaintiff filed upon and received a certificate of purchase for the northwest quarter of a certain section, and defendant's grantor had filed upon and obtained a certificate for the southwest quarter of the same section, according to a survey made in the year 1865, but in 1882, and after the certificates had been issued to the respective parties, the Government caused a new survey to be made by which the south half of the northwest quarter became the north half of the southwest quarter, thus giving the defendant eighty acres which had previously been included in the lines of plaintiff's certificate, and on his eighty acres were the improvements of the plaintiff. No patent had issued to either party. The plaintiff sued to quiet his title to the eighty acres, which by the new survey had been removed within defendant's lines. The Court held first, that under the statutes of Dakota that an action to quiet title would not lie; and in addition to that reviewed the decisions of the Supreme Court of the United States and all the States, showing that the Court had no jurisdiction to decide the respective claims of parties whose rights had been adjudicated by the land department until after the issuance of patent. After coming to the same conclusion as did the authorities reviewed, and to that

which we have urged here, the opinion closes with this passage:

"The power of supervision, given the Secretary and Commissioner, is a general one,—a supervision over all the acts of the Register and Receiver. There is no exception made in the matter of issuing of final certificates; and if the position here contended for be the correct one, to-wit, that the Commissioner must issue a patent at once upon the presentation of the certificate, and that the issue of the certificate concludes all inquiry into all matters settled by its issue, then it concludes all supervision by the superior officers; and on that reasoning the patent might as well issue by the local as by the supervisory officers. We are led to adopt the contrary of this reasoning. In our judgment, the Secretary of the Interior, and, under his direction, the Commissioner of the General Land Office is charged with the supervision of the public lands for the very purpose of preventing frauds, mistakes and errors in the disposition of such lands by the local officers; and when such officers have committed errors or mistakes, or have been imposed upon by fraud, the entire case may be re-examined upon appeal, or so far supervised, in the usual course of transmission through the department, as to expose and correct such errors or frauds, to the end that the patent may issue to the pre-emptor honestly entitled to it under the law. Any other rule would make the 'right of pre-emption, arising between different settlers,' to be determined by the Courts, instead of by the Register and Receiver, as provided by the statute, in a large class of pre-emption cases. It is no answer to say that fraud is a question for the Courts; that its determination is judicial in character, and that such power cannot be exercised by the executive department. The determination of 'the right of pre-emption arising between different settlers,' and the weighing and considering of testimony as to settlement, improvements, etc., upon which such right depends, is essentially judicial in character; yet no one doubts the right of Congress to confer such powers upon a branch of the executive department. No private rights intervene so long as the title, legal and equitable, remains in the Government, or while such title may be held as derived from the Government through fraud or mistake;

and the department in these cases only passes upon the questions of fraud or mistake so far as to determine whether it, the department, will re-examine or re-open the case already determined. It does not seek to adjudicate upon the fraud or mistake, alleged as such between private parties. The case made is a *prima facie* one in practice,—a petition for a review of the former decision, upon *exparte* showing of fraud or mistake as against the Government; and while the case is pending in the department, and before patent issues, the Secretary and under his direction, the Commissioner, ought to have, and in our fudgment they clearly have, such power of re-examination and re-adjudication in a proper way, under the pre-emption act of 1841 and the amendments thereto. We are clearly of the opinion that the supervisory and appellate powers vested in the Secretary of the Interior, and the Commissioner of the General Land Office, under his direction, give them the right to examine all acts of the Register and Receiver. In matters of fact left to the determination of the local officers, the jurisdiction of the Secretary and Commissioner may be exercised by appeal, and a re-examination of the facts themselves, or by examination of their action, and requiring them again to examine the questions of fact involved; and in all cases they may supervise the purely administrative or executive acts of the local officers. We are led, then, to the conclusion that, prior to the issue of the patent, the plaintiff cannot maintain this action. This Court cannot know but that the department may issue to him, instead of to the defendant, a patent for the premises in controversy; and if his claim is just and right (a question upon which this Court does not pass), the law presumes he will obtain a patent, upon the ground that all officers are presumed to act justly and to do their duty."

Upon the proposition that the Commissioner of the General Land Office has power to cancel a pre-emption entry, we cite the following additional authorities:

Steigart vs. Walker, 30 Pacific R., p. 162.

Fernald vs. Winch, 31 Pacific R., p. 665.

United States vs. Steenerson, 50 Federal R., p. 504.

The cases of Smith vs Irving 25 Fed R. 741 and Wilson vs Fine 40 Fed R. 57 have been repudiated and overruled by the Court in which they were decided.

American Mortgage Co. vs Horton 56 Fed R. 67.

Am. Mortgage Co. vs. Hop,

Knight vs. United Land Association, Supreme Court Reports, Vol. 12, p. 258.

Lancaster,

Attorneys for Defendant in Error.

JOHN P. JUDSON and
W. C. SHARPSTEIN,
of Counsel for Defendant in Error.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

EBEN PIERCE,
PLAINTIFF IN ERROR,
vs.
JAMES A. FRACE,
DEFENDANT IN ERROR.

APPEAL FROM THE SUPREME COURT, STATE OF WASHINGTON.

BRIEF FOR DEFENDANT IN ERROR.

Filed this..... day of ....., 1893.

.....Clerk.

Attorneys for Defendant in Error.

JOHN P. JUDSON and
W. C. SHARPSTEIN,
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F. T. HOUGHTON & CO., PRINTERS, TACOMA

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STATEMENT OF THE CASE.

The facts as disclosed by the pleadings in this action are as follows: On December 20, 1880, the plaintiff in error filed his declaratory statement for the premises in controversy under the pre-emption laws of the United States. On February 13, 1883, or nearly twenty-six months after the filing of his declaratory statement, the

plaintiff in error made final proof to the satisfaction of the Register and Receiver of the United States Land Office at Olympia, and on March 12, 1883, or nearly twenty-seven months after filing his declaratory statement, the cash entry of plaintiff in error was allowed by the Register and Receiver; that thereafter and on August 7, 1883, or more than thirty-one months after plaintiff in error filed his declaratory statement, and while the final proof of plaintiff in error was in the hands of the Commissioner of the General Land Office for his approval the defendant in error filed with said Commissioner his corroborated affidavit in which he alleged that plaintiff in error had "at no time established his residence on said land; that he had failed to improve and cultivate the same as required by law, and that the said cash entry had been procured by fraud."

The Commissioner on the 16th day of May, 1885, suspended the entry of the plaintiff in error and ordered a hearing to be had touching the charges made by defendant in error in said affidavits before the Register and Receiver. On July 13, 1885, said hearing was had at which plaintiff in error appeared with his witnesses, as did also the defendant in error; the evidence was taken, the matter was fully argued by counsel for plaintiff in error, and after argument the Register and Receiver found that plaintiff in error "at no time established his residence on the land embraced in his said cash entry; that he failed to cultivate and improve said land as required by law," and he therefore advised that said cash entry be cancelled. Plaintiff in error thereupon took an appeal from the decision of the Register and Receiver to the Commissioner of the General Land Office, and on

June 3, 1886, the Commissioner affirmed said decision and ordered plaintiff in error's cash entry to be cancelled. Again plaintiff in error took an appeal; this time to the Secretary of the Interior, and on March 31, 1888, the Secretary affirmed the decision of the Commissioner of the General Land Office, and thereafter cancelled said plaintiff's cash entry.

Subsequently the defendant in error filed upon said premises embraced in said cash entry under the homestead laws of the United States, and thereafter made his final proof and received from the Register and Receiver of the Land Office his patent certificate for said premises. On September 18, 1889, plaintiff in error commenced an ordinary action in ejectment against defendant in error, in the District Court, holding terms at Tacoma. To this complaint defendant in error filed an answer denying the allegations of the complaint and set up by way of equitable defense the matters just detailed. To this answer plaintiff in error filed an amended reply in which he asserts that the proceedings of the Land Office after the 12th day of March, 1883, the date on which his certificate was issued, "were wholly void for the reason that said officers had no jurisdiction whatever over the said land or the plaintiff" in error. He also denies that the defendant in error, in the affidavit filed by him with the Commissioner of the General Land Office, alleged that the plaintiff in error failed to improve and cultivate said land as required by law or that said entry of plaintiff in error had been procured by fraud.

This denial, however, leaves admitted the allegation in said affidavit, *that plaintiff in error had at no time established his residence on said land.*

He further denies that the decision of the Commissioner of the General Land Office was affirmed by the Secretary of the Interior, except as to the findings of the the Register and Receiver and Commissioner, *that plaintiff in error had not made his residence upon said land. The pleadings therefore disclose the fact that the officers of the land department found as a fact that plaintiff in error had at no time established his residence on the land for which he had procured the certificate of the Register and Receiver.*

Defendant in error demurred to the amended reply of plaintiff in error, because it did not state facts sufficient to constitute a defense to the equitable defense set up by defendant in error. The Court sustained this demurrer and plaintiff in error declining to amend, judgment was entered dismissing the action and for costs.

From this judgment and from the order sustaining the demurrer plaintiff in error appeals.

POINTS OF LAW AND AUTHORITIES.

There are two issues of law raised by the pleadings:

FIRST:

Whether the Court had any jurisdiction of the subject matter of this action, and

SECOND:

Whether the officers of the land department had not jurisdiction to cancel the entry of plaintiff in error.

These questions involve practically the same argument.

but we propose to discuss them separately for convenience.

PRIOR TO THE ISSUANCE OF PATENT THE CONTROL AND DISPOSITION OF THE PUBLIC LANDS OF THE UNITED STATES IS VESTED EXCLUSIVELY IN THE INTERIOR DEPARTMENT OF THE UNITED STATES, AND NEITHER THE COURTS OF THE UNITED STATES OR OF THE SEVERAL STATES HAVE ANY JURISDICTION, EITHER DIRECTLY, BY INJUNCTION OR MANDAMUS, AGAINST THE OFFICERS OF THAT DEPARTMENT, TO CONTROL OR DIRECT THEIR JUDGMENT, OR, INDIRECTLY IN ACTIONS BETWEEN INDIVIDUALS CLAIMING THE SAME LAND, WHICH SHALL, IN EFFECT, NULLIFY ANY DECISION OF SAID OFFICERS WITH RESPECT TO THE DISPOSITION OF SAID LANDS.

The provisions of the Revised Statutes as to the powers and duties of the officers of the land department are as follows:

THE Interior department is a branch of the Executive. Section 158.

"The Secretary of the Interior is charged with the supervision of the public business relating to the public lands." Section 441.

"The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties pertaining to the * * * sale of public lands of the United States or in any wise respecting such public lands, and also such as relate to private claims of lands and the issuing of patents for all grants of lands under the authority of the government." Section 453.

All returns relative to the public lands shall be made to the Commissioner of the General Land Office * * Section 456.

"All patents issuing from the General Land Office shall be issued in the name of the United States, and be signed by the President, and countersigned by the Recorder of the General Land Office; and shall be recorded in the Office, in books to be kept for the purpose. Section 458.

"It shall be the duty of the Recorder of the General Land Office, in pursuance of instructions from the Commissioner, to certify and affix the seal of the office to all patents for public lands. * * * Section 459.

"The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this Title, not otherwise specially provided for. Section 2478.

The provisions of the Revised Statute relating to pre-emptions are as follows:

"All lands belonging to the United States, to which the Indian title has been or may hereafter be extinguished, shall be subject to the right of pre-emption, under the conditions, restrictions, and stipulations provided by law. Section 2257.

"The following classes of lands, unless otherwise specially provided by law, shall not be subject to the rights of pre-emption, to-wit:

First—Lands included in any reservation by any treaty, law, or proclamation of the President, for any purpose.

Second—Lands included within the limits of any incorporated town, or selected as the site of a city or town.

Third—Lands actually settled and occupied for purposes of trade and business, and not for agriculture.

Fourth—Lands on which are situated any known salines or mines. Section 2258.

"Every person, being the head of a family, or widow, or single person, over the age of twenty-one years, and a citizen of the United States, or having filed a declaration of intention to become such, as required by the naturali-

zation laws, who has made, or hereafter makes, a settlement in person on the public lands subject to pre-emption, and who inhabits and improves the same, and who has erected or shall erect a dwelling thereon, is authorized to enter with the Register of the Land Office for the district in which such land lies, by legal subdivisions, any number of acres, not exceeding one hundred and sixty, or a quarter section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land. Section 2259.

The following classes of persons, unless otherwise specially provided for by law, shall not acquire any right of pre-emption under the provisions of the preceding section, to-wit:

First—No person who is the proprietor of three hundred and twenty acres of land in any State or Territory.

Second—No person who quits or abandons his residence on his own land to reside on the public lands in the same State or Territory. Section 2260.

"No person shall be entitled to more than one pre-emptive right by virtue of the provisions of section twenty-two hundred and fifty nine; nor where a party has filed his declaration of intention to claim the benefits of such provisions, for one tract of land, shall he file, at any future time, a second declaration for another tract. Section 2261.

"Before any person claiming the benefit of this chapter is allowed to enter lands, he shall make oath before the Receiver or Register of the land district in which the land is situated that he has never had the benefit of any right of pre-emption under section thirty-two hundred and fifty-nine; that he is not the owner of three hundred and twenty acres of land in any State or Territory; that he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself; and if any person

taking such oath swears falsely in the premises, he shall forfeit the money which he may have paid for such land, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, for a valuable consideration, shall be null and void, except as provided in section twenty-two hundred and eighty-eight. And it shall be the duty of the officer administering such oath to file a certificate thereof in the public land office of such district, and to transmit a duplicate copy to the General Land Office, either of which shall be good and sufficient evidence that such oath was administered according to law. Section 2262.

"Prior to any entries being made under and by virtue of the provisions of section twenty-two hundred and fifty-nine, proof of the settlement and improvement thereby required shall be made to the satisfaction of the Register and Receiver of the land district in which such lands lie, agreeably to such rules as may be prescribed by the Secretary of the Interior; and all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void." Section 2263.

The Secretary of the Interior has by virtue of this last section of the Revised Statutes at various times prescribed rules and regulations and given instructions to Registers and Receivers relative to entries in pre-emption cases and at the time that the Commissioner of the General Land Office ordered a rehearing as to the proof of plaintiff in error the following circular instructions were in force:

"Failure to inhabit and improve the land in good faith as required by law renders the claim subject to contest and the entry to investigation.

"Final proof in pre-emption cases must be made to the satisfaction of Register and Receiver, whose decision as in other cases is subject to examination and review by this office."

These provisions of the Revised Statutes indicate

clearly that when a person has complied with the conditions prescribed by law that he is to make proof of this fact to the satisfaction of the Register and Receiver in the first instance, but that their conclusion is not final but subject to the supervision of the Commissioner of the General Land Office The determination of the Commissioner is judicial in its character. If he decides that the patent should issue he prepare the patent for execution and thereupon it is signed by the President and countersigned by the Recorder of the General Land Office and recorded. When this last act is completed and not till then the authority of the land department over the land named in the patent ceases. The patent is the only evidence of title which is authorized by Congress. The very essence of sovereignty lies in its nonliability to be sued. And the fact that the decision from which we shall presently quote deny the right of the Courts to compel the Commissioner of the General Land Office to issue a patent necessarily determines as matter of law that the land department has the exclusive jurisdiction of the public lands and of their control and disposition.

The first case of which we have any knowledge which has defined the effect of a patent is entitled

Bagnell vs. Broderick, 13 Peters Reports, 436.

On page 450 appears the following :

"Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the Federal Government, in reference to the public lands, declares the patent the superior and conclusive evidence of legal title ; until its issuance, the fee is in the government, which, by the

patent, passes to the grantee; and he is entitled to recover the possession in ejectment."

The doctrine laid down in the above case has been followed by the Supreme Court of the United States and by the State Courts of every State, so far as we are advised, and but one Court in the country has controverted this doctrine, and that is the Circuit Court of the United States for the District of Oregon. As the case at bar involves questions of the greatest importance, and as the value of the land involved is considerable, we shall examine every case which has any bearing on the question; and for this reason it will become necessary for us to extend the limits of this brief beyond what we ordinarily would were there not so much involved, and we trust that the Court will bear with us if we find it necessary to discuss questions which have been regarded settled for many years.

In the case of

Wilcox vs. Jackson, 13 Peters' Reports, 108.

Wilcox was an army officer in command of Fort Dearborn at Chicago. The action by Jackson was to recover a portion of the premises of the military post. The post was in possession and had been in the possession of the War Department from the year 1804, and while at various times the post had been discontinued the War Department had never relinquished its proprietorship in the lands. It appeared that during one of these periods when the property was not in actual use by the War Department that one Beaubéan entered into possession of a portion of the premises included in this post, and filed upon the same as a pre-emption and subsequently a cer-

tificate of entry was issued to him. Beaubean subsequently conveyed the premises and Jackson claims under said grantee. The claim was made in that case as in this, that the issuing of a certificate was the conveyance of title by the United States, and that it was paramount to any other claim of title. The Court at page 516 in disposing of this question used the following language:

"We think it unnecessary to go into a detailed examination of the various acts of Congress, for the purpose of showing what we consider to be true in regard to the public lands, that with the exception of a few cases, nothing but a patent passes a perfect and consumate title. One class of cases to be excepted is where an act of Congress grants land, as is sometimes done in words of present grant. But we need not go into these exceptions. The general rule is what we have stated; and it applies as well to pre-emptions as to other public lands. Thus it will appear by the very act of 1836, which we have been examining, that patents are to issue in pre-emption cases. This then being the case, and this suit having been in effect against the United States; to hold that the party could recover as against them, would be to hold that a party having an inchoate and imperfect title could recover against the one in whom resided the perfect title. This, as a general proposition of law, unquestionably, cannot be maintained.

But it is argued that a law of the State of Illinois declares that a Register's certificate shall be deemed evidence of title in the party sufficient to recover possession of the lands described in such certificate, in any action of ejectment or forcible entry and letainer; but the same law declares that this shall be the case, unless a better legal and paramount title be exhibited for the same. Upon the construction of the law itself it would not apply to this case, because the United States not having parted with a consumate legal title by issuing a patent, a better legal and paramount title was exhibited for the same. Where that was not the case, but the suit should be against any person not having the right of possession, or against a trespasser, these are the kinds of cases in which

it would seem to us, by the proper construction of the act, that it was intended to operate.

A much stronger ground, however, has been taken in argument. It has been said that the State of Illinois has a right to declare by law that a title derived from the United States, which by their laws is only inchoate and imperfect, shall be deemed as perfect a title as if a patent had been issued from the United States; and the construction of her own Courts seems to give that effect to her statute. That State has an undoubted right to legislate as she may please in regard to the remedies to be prosecuted in her Courts and to regulate the disposition of the property of her citizens by descent, devise, or alienation. But the property in question was a part of the public domain of the United States; Congress is invested by the Constitution with the power of disposing of and making needful rules and regulations respecting it. *Congress has declared, as we have said, by its legislation, that in such a case as this a patent is necessary to complete the title. But in this case no patent has issued; and therefore by the laws of the United States the legal title has not passed, but remains in the United States. Now if it were competent for a state legislature to say, that notwithstanding this, the title shall be deemed to have passed; the effect of this would be, not that Congress had the power of disposing of the public lands, and prescribing the rules and regulations concerning that disposition, but that Illinois possessed it.* That would be to make the laws of Illinois paramount to those of Congress, in relation to a subject confided by the Constitution to Congress only, and the practical result in this very case would be, by force of State legislation to take from the United States their own land, against their own will and against their own laws. We hold the true principle to be this, that whenever the question in any Court, State or Federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."

In the case of

United States vs. the Commissioner, 5 Wallace Reports, 563.

the facts were that the holder of the certificate petitioned for a mandamus to compel the Commissioner of the General Land Office to cause to be prepared, signed, countersigned, recorded and issued a patent to him for the premises described in his certificate of purchase. The certificate was issued on a private entry. The return set up that another party had entered this same land under a pre-emption right prior to the entry of the relator and that the latter's certificate of purchase had been cancelled. The Court below refused the writ and the case on appeal to the Supreme Court of the United States affirmed the order of the Court below. In the course of the opinion on page 565, the Court says :

"Whether or not a mandamus will lie in any case to compel the issuing of a patent is a question not necessarily involved in this case. We have not therefore examined it and express no opinion upon it. We have found no case in which this power has been exercised. Patents are to be signed by the President in person, or in his name by a Secretary under his direction, and countersigned by the Recorder of the General Land Office."

This latter statement would seem to indicate very clearly that in no case would mandamus lie.

The case of

Gaines vs. Thompson, 7 Wallace Reports, 347,

discloses the following state of facts :

The Secretary of the Interior having directed the Commissioner of the General Land Office to cancel an entry under which Gaines and others claimed an equitable right

to certain lands in Arkansas, these last brought suit in the Circuit Court of the District of Columbia, praying that the Secretary and Commissioner should be enjoined from making such cancellation. The plea set up was that the matters contained in the bill were in exclusive control of the Executive Department of the Government, the Secretary and Commissioner representing the President, and that the Court had no jurisdiction or authority to interfere with the exercise of this power by injunction. The Court below sustained the plea, and on appeal the Court, by Miller, Justice, has this to say of the powers of the land office. After discussing the nature of the acts sought to be enjoined and distinguishing between those purely ministerial and those judicial in their character, the Court says, on pages 352-3-4:

"Certain powers and duties are confided to those officers, and to them alone, and however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, after the matter has once passed beyond their control there exists no power in the courts, by any of its processes, to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action. The reason for this is, that the law reposes this discretion in him for that occasion, and not in the courts. The doctrine, therefore, is as applicable to the writ of injunction as it is to the writ of mandamus.

"In the one case the officer is required to abandon his right to exercise his personal judgment, and to substitute that of the Court, by performing the act as it commands. In the other he is forbidden to do the act which his judgment and discretion tell him should be done. There can be no difference in the principal which forbids interference with the duties of these officers, whether it be by writ of mandamus or injunction * * *

"The action of the officers of the land department, with which we are asked to interfere in this case, is clearly not

of this character. The validity of plaintiffs' entry, which is involved in their decision, is a question which requires the careful consideration and construction of more than one act of Congress. It has been for a long time before the department, and has received the attention of successive Secretaries of the Interior, and has been found so difficult as to justify those officers in requiring the opinion of the Attorney General. It is far from being a ministerial act under any definition given by this Court.

The numerous cases referred to by counsel, in which this Court—after the title had passed from the United States, and the matter had ceased to be under the control of the Executive Department—has sustained the courts of justice in decreeing the equitable title to belong to the person against whom the department had decided, are not in conflict with these views, but furnish an additional reason for refusing to interfere with such cases while they remain under such control."

The next case decided by the Supreme Court of the United States where this same question was involved was an appeal from the Supreme Court of the State of California.

The case is entitled:

Hosmer vs. Wallace,

and is reported in

47 California Reports, 461.

As the opinion of the Supreme Court of California harmonizes with our view of the functions of the Land Department and of the Courts, we set it out *in extenso*, beginning at page 467:

"The plaintiff appeals, on the judgment-roll alone, from a judgment in favor of the defendant; and the only question before us is, whether on the pleadings and findings the plaintiff is entitled to the relief demanded. *The principal question in the case is, whether on the facts admitted by the pleadings or found by the Court, the action of the*

Register and Receiver, in permitting the plaintiff's entry and accepting the purchase price, was subject to the revision and control of the Commissioner of the General Land Office and the Secretary of the Interior. It appears from the findings, that after the plaintiff had proved up his pre-emption claim, and had paid the purchase money and obtained his certificate, the Commissioner of the General Land Office, on receiving information of the claim of defendant to enter the land now in lots two and six, ordered and directed the Register and Receiver at San Francisco to investigate the entry and purchase of the north half of the north half of said section one, made by plaintiff as alleged in the complaint, and directed said Register and Receiver to take such testimony as might be offered by said plaintiff and said defendant respectively, concerning their respective claims to said lots two and six, and to report the same with their decision thereon to said Commissioner.' *It further appears that in pursuance of this instruction, notice was given to the plaintiff and defendant, who appeared before the Register and Receiver, and litigated their respective rights.* The decision of the Register and Receiver was in favor of the plaintiff, from which the defendant appealed to the Commissioner of the General Land Office, by whom the decision of the Register and Receiver was reversed, and the land awarded to the defendant. From this decision the plaintiff appealed to the Secretary of the Interior, who affirmed the ruling of the Commissioner; and on the return of the case to the Register and Receiver the defendant paid the purchase price and received a duplicate receipt therefor; whereupon a patent issued to him, under which he now holds the land.

"The plaintiff claims that the patent wrongfully issued to the defendant, and ought rightfully to have issued to the plaintiff; and the object of the present action is to compel a conveyance of the legal title. * * * *It becomes material, therefore, to inquire first whether, on the facts admitted by the pleadings or contained in the findings, the Commissioner of the General Land Office and the Secretary of the Interior had jurisdiction to set aside the decision of Register and Receiver, awarding the land to the plaintiff;* and if this question be answered in the affirmative, second, whether their action in the

premises can be reviewed in the Courts in the absence of an allegation of fraud, accident, or a mistake of facts, induced by false affidavits or fraudulent practices. *If the action of the Register and Receiver, in permitting the plaintiff's entry and accepting payment of the purchase money, was subject to be reviewed and set aside by the Commissioner of the General Land Office, or, on appeal, by the Secretary of the Interior, then it is plain that the plaintiff has no title which a Court of Equity will enforce, unless the action of these officers can be reviewed on some ground of equitable cognizance to be alleged and proved. They have decided his case against him, and if they had jurisdiction of the proceeding, and were empowered by law to decide the controversy, their decision concludes the plaintiff, unless it can be impeached on some of the grounds on which Courts of Equity interfere to correct errors of law, to prevent fraud, or to correct mistakes superinduced by false representation or fraudulent practices.* On the question of jurisdiction it may be observed, *in limine*, that under the land system of the United States, the Commissioner of the General Land Office, subject to the supervision of the Secretary of the Interior, is at the head of the department having in charge the sale and disposal of the public lands. He is authorized to make rules and regulations, not inconsistent with law, for the government of the numerous subordinate officers, dispersed over a vast territory, and many of them at remote points from the seat of government. The interests confided to this branch of the public service are of great magnitude, affecting both public and private rights; and the trusts reposed in subordinate officers are capable of gross abuses. UNDER THESE CIRCUMSTANCES, IT IS NOT A REASONABLE INFERENCE, THAT CONGRESS INTENDED THE DECISION OF THE REGISTER AND RECEIVER TO BE ABSOLUTELY FINAL, IN ANY MATTER PERTAINING TO THE SALE OF PUBLIC LANDS. BEFORE PERMITTING THE ENTRY OF A PRE-EMPTION CLAIMANT, THEY ARE REQUIRED TO TAKE CERTAIN PROOFS TOUCHING THE QUALIFICATION OF THE APPLICANT, AND THE ACTS HE HAS PERFORMED TO ENTITLE HIM TO PURCHASE THE LAND. ON THE THEORY OF THE PLAINTIFF, IF THEY SHOULD MAKE A MISTAKE, HOWEVER GROSS IN THESE RESPECTS, AND AWARD THE LAND TO A CLAIMANT CLEARLY NOT ENTITLED TO IT,

FOR LACK OF THE NECESSARY QUALIFICATION, OR BECAUSE OF HIS FAILURE TO PERFORM THE REQUISITE CONDITIONS, THE COMMISSIONER OF THE GENERAL LAND OFFICE WOULD BE WHOLLY POWERLESS TO APPLY THE PROPER REMEDY, BY SETTING ASIDE THE ENTRY AND RETURNING THE PURCHASE MONEY, UNLESS THERE SHOULD BE AN ADVERSE CLAIMANT, WHO BROUGHT UP THE CASE ON APPEAL. BUT IF THERE WERE NO ADVERSE CLAIMANT, IT IS CONTENDED, THE DECISION OF THE REGISTER AND RECEIVER WOULD BE ABSOLUTELY FINAL, AND THAT ON PAYING THE PURCHASE MONEY AND OBTAINING HIS DUPLICATE RECEIPT THE CLAIMANT WOULD THEREBY ACQUIRE AN EQUITABLE TITLE, WHICH THE COMMISSIONER OF THE GENERAL LAND OFFICE OR THE SECRETARY OF THE INTERIOR WOULD BE POWERLESS TO DIVEST BY SETTING ASIDE THE ENTRY, HOWEVER CLEARLY IT MIGHT APPEAR THAT THE CLAIMANT WAS NOT ENTITLED TO THE LAND. If the local officers were subject to no supervisory control in this respect, it is easy to see that the opportunities for fraudulent entries would be greatly multiplied, and that the land system would be capable of great abuses. It was, doubtless, in view of this fact, and to promote uniformity in the administration of the laws for the sale of the public domain, that Congress, by the act of July 4th, 1836, entitled 'An Act to Re-organize the General Land Office,' enacted 'that from and after the passage of this Act the executive duties now prescribed or which may hereafter be prescribed by law, appertaining to the survey and sale of the public lands of the United States, or in anywise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States."

"THIS LANGUAGE IS SO EXPLICIT AS TO NEED NO INTERPRETATION. IF ALL THE EXECUTIVE DUTIES APPERTAINING TO THE "SALE OF THE PUBLIC LANDS OF THE UNITED STATES, OR IN ANYWISE RESPECTING SUCH PUBLIC LANDS, ARE TO BE SUBJECT TO THE SUPERVISION AND CONTROL OF THE COMMISSIONER OF

THE GENERAL LAND OFFICE,' IT IS IMPOSSIBLE TO ESCAPE THE CONCLUSION THAT THE ACTS OF THE REGISTER AND RECEIVER, IN PERMITTING AN ENTRY OF A PARCEL OF PUBLIC LAND BY A PRE-EMPTIONER, ARE SUBJECT TO THE 'SUPERVISION AND CONTROL' OF THE COMMISSIONER, WHETHER THE MATTER BE BROUGHT TO HIS ATTENTION BY APPEAL OR OTHERWISE. HIS DUTY TO SUPERVISE AND 'CONTROL' THE ACTS OF HIS SUBORDINATES IS NOT MADE TO DEPEND UPON THE ACCIDENTAL CIRCUMSTANCES WHETHER THERE BE ADVERSE CLAIMANTS OF THE LAND. IF HIS AUTHORITY WAS THUS LIMITED, IT WOULD OPEN THE DOOR TO NUMEROUS FRAUDS; AND, IN A LARGE CLASS OF CASES, THERE WOULD BE NO MEANS OF CORRECTING THE MISTAKES AND BLUNDERS OF INCAPABLE LOCAL OFFICERS. WE ARE SUPPORTED IN THESE VIEWS BY THE LATE CASE OF JOHNSON VS. TOWSLEY, 13 WALLACE, PAGE 72.

"We are, therefore, of opinion, that the Commissioner of the General Land Office and the Secretary of the Interior on appeal, had the jurisdiction to 'control' the action of the Register and Receiver in permitting the plaintiff's entry, and had lawful authority to set it aside if erroneous.

"It remains to be considered to what extent the action of these officers may be reviewed in the courts. It is a rule resting on reason and authority as well, that in the absence of fraud, or fraudulent imposition on the officers of the land department, their determination of matters of fact is not open to review in the courts. Being a special tribunal to which the law confides the duty of deciding upon facts which are brought in question before them, their decision, if free from fraud, and not the result of a fraudulent imposition upon them, is final and conclusive. They may err in their judgment as to the weight of testimony, or may decide directly against the evidence.

"But no appeal lies to the courts to correct such errors. (Johnson vs. Towsley, supra). If every disappointed applicant for the purchase of a quarter section of land could appeal from the decision of the Land Department to the Courts on controverted questions of fact, the delays would be most vexatious, and the litigation interminable. But these officers are not above the law, which prescribes a

rule of conduct for them, and to which their official acts, like those of all other executive officers are subject. If, on an admitted state of facts, they perform an act not authorized by law, the courts will redress the wrong or apply the proper corrective. The courts have frequently exercised jurisdiction in such cases and have reversed the action of the Land Department in awarding the land to one person, when the law awarded it to another, and that too, in the absence of any charge of fraud or imposition.

"But in the case at bar it does not appear, either from the pleadings or findings, what facts were proved before the Register and Receiver; the only averement in the complaint on this point being 'that he made proof of his said pre-emption claim and right under the laws of the United States of America, to the satisfaction of the Register and Receiver of the United States Land Office,' etc. The decision of the Register and Receiver, however, was not satisfactory to the Commissioner of the General Land Office who ordered them 'to investigate the entry and purchase of the north half of the north half of the said section one, made by the plaintiff,' and directed them to take such testimony as might be offered by the plaintiff and defendant respectively, and to report the same, with their decision thereon, to the Commissioner. This testimony was accordingly taken, but it does not appear what facts were proved on this second investigation. The decision of the Register and Receiver being again in favor of the plaintiff, was again disproved by the Commissioner, in respect to the land in controversy, and his decision was affirmed, on appeal, by the Secretary of the Interior. *For aught that appears in this record, the decision of the two highest officers of the Land Department at Washington, in rejecting the plaintiff's claim, may have turned wholly upon the question of the sufficiency or insufficiency of his proofs, to entitle him to pre-empt the land under the general pre-emption law. The proofs are not before us; and if they were, it is the exclusive province of the Land Department to decide upon the sufficiency or insufficiency of the evidence to establish the necessary facts. Nor do the pleadings or express findings negative the inference, that in the opinion and judgment of the Commissioner and Secretary, the plaintiff's proofs were insufficient to establish his claim under the general pre-emption*

laws. The only facts found or admitted by the pleadings on this branch of the case are, that the plaintiff made proof of his claim to the satisfaction of the Register and Receiver, and that the Commissioner on receiving information of the defendant's claim, ordered a reinvestigation of the plaintiff's claim; whereupon new proofs were taken, and another decision rendered by the Register and Receiver, in favor of the plaintiff, which was reversed by the Commissioner and Secretary, by whom the land was awarded to the defendant. THERE IS NOTHING IN THE RECORD TO REBUT THE INFERENCE, THAT THE DECISION OF THESE OFFICERS MAY HAVE PROCEEDED WHOLLY ON THE GROUND THAT IN THEIR JUDGMENT, THE PLAINTIFF'S PROOFS WERE NOT SUFFICIENT TO ESTABLISH THE PERFORMANCE OF THE NECESSARY ACTS TO ENTITLE HIM TO THE BENEFIT OF THE GENERAL PRE-EMPTION LAWS.

IN ORDER TO PRESENT A CASE OF WHICH A COURT OF EQUITY WOULD TAKE COGNIZANCE, IT OUGHT DISTINCTLY TO HAVE APPEARED THAT THE COMMISSIONER WAS MISTAKEN, NOT IN THE FACTS, BUT IN THE LAW OF THE CASE. AS WE HAVE ALREADY SEEN, HIS JUDGMENT ON THE FACTS CANNOT BE REVIEWED IN THE COURTS, IN THE ABSENCE OF FRAUD OR IMPOSITION, WHILST HIS DECISION OF QUESTIONS OF LAW MAY BE. THE PLEADINGS AND FINDINGS FAIL TO SHOW THAT THE ERROR, IF THERE BE ONE, OF THE COMMISSIONER AND SECRETARY, WAS NOT PURELY AN ERROR OF FACT, AND NOT OF LAW."

This case is peculiarly in point, if we leave out of consideration the question of contest. Under the supervisory powers entrusted to the Commissioner of the General Land Office, he ordered a hearing after the Register and Receiver had awarded the certificate. Upon this hearing the Register and Receiver held as before, yet notwithstanding this the Commissioner of the General Land Office and the Secretary of the Interior joined in cancelling the entry. In that case, however, it did not appear to the Court on what ground the entry was cancelled and in

absence of such showing the Court assumed it was on a question of fact as to whether the claimant had complied with the law. And the Court therefore refused to interfere, holding that a decision on a question of fact is conclusive unless attacked for fraud or imposition. In the case at bar it is admitted that all three tribunals, Register and Receiver, Commissioner of the General Land Office and Secretary of the Interior found in succession that plaintiff in error "at no time established his residence on the land embraced in his said cash entry." Now what is the inference to be derived from the finding? To have obtained the certificate in the first instance plaintiff in error must have introduced proof (?) to the effect that he had "established his residence on the land embraced in his said cash entry." The subsequent finding was made after a trial in which a well directed cross-examination probed into the facts, showed that he had not established his residence. Hence since there is no charge of fraud, perjury or the like, the conclusion is irresistable that plaintiff in error committed fraud in making his so-called proof.

On appeal to the Supreme Court of the United States the judgment of the Supreme Court of California was affirmed.

The case is reported in 97 United States, 575.

The latest decision from the Supreme Court of the United States is entitled:

United States vs. Jones, and is reported in 131 United States Reports, page 1, and also in 9 Supreme Court Reporter, page 669.

This case came on writ of error from the United

States Circuit Court for the District of Oregon, and was from the decision of Judge Deady. This is probably as opportune an occasion as we could find to discuss the various decisions of Judge Deady relating to the public lands. No one who has read his decisions but has been impresssed with the seeming eagerness of Judge Deady to decide against the Government in all cases arising out of the public land laws. We have not time here, nor perhaps would it be proper to make a list of these decisions, but we think a few of them may be mentioned with some profit.

Every one knows that the public lands of the United States are being stripped daily of the valuable timber on them, and it is also well known that the Government is constantly bringing suits against trespassers who have cut timber from these lands.

In a case entitled,

United States vs. Ball, 31 Federal Reporter 667,

Judge Deady announced this doctrine:

"That if a person having applied to purchase timber land but before receiving the certificate cuts and removes the timber therefrom and afterwards obtains a certificate from the Register and Receiver of his compliance of the law, the United States cannot thereafter maintain an action against him for damages for cutting such timber nor against any one to whom he may have disposed of the same for the conversion thereof."

Our own Supreme Court in the case of the United States vs. Kelly, 3 Washington Territory Reports 421, repudiates this doctrine; and holds very properly that the original taking being wrongful the subsequent conveyance of the land was no waiver of the right to sue for the conversion of the timber, and we have no doubt that the Supreme Court of the United States would so hold. The decision of the Supreme Court of this Terri-

tory is abundantly sustained by many of the Supreme Courts of the States. But to return to the case of the United Stares vs. Jones, Judge Deady in the same case reported in the

35 Federal Reporter 561,

held that the act of Congress providing for the bringing of suits against the United States for the recovery of money in effect was equivalent to permitting suits for specific performance against the Government to compel the issuance of a patent where a certificate had been issued.

On pages 562-3 he says:

"An applicant for land under this act (referring to the timber act) becomes the purchaser thereof when he makes the prescribed proof to the satisfaction of the Register, and pays the prescribed price therefor. When the certificate of purchase is issued to the applicant the land described therein becomes his property. The bare legal title is all that remains in the vendor in trust for the vendee; and if it was the case of a private person, a court of equity would compel him to perform his part of the contract, by executing and delivering to the vendee the proper conveyance thereof.

If it is claimed that the certificate was fraudulently or illegally obtained, the land department cannot arbitrarily, or at all, cancel the same or set it aside. The certificate, and the right of the purchaser thereunder, is property, of which he cannot be deprived without due process of law; and mere fiat law, by whomsoever pronounced, can have no such effect. Redress must be had in the Courts where such matters are properly cognizable, and where they may be heard and determined according to the law of the land—the law applicable to the rights and obligations of private persons under like circumstances."

And to support this doctrine Judge Deady cites his own decision in the case of

Smith vs. Ewing, 23 Federal Reporter 741,

a case to which we shall hereafter pay our respects.

At about the same date as the rendition of the decision

from which we have just quoted the Circuit Court of the United States for the Northern District of Iowa, after citing with approval cases from the Supreme Court of the United States, holds that this same act under which Judge Deady held that the Government could be compelled to specifically perform will not permit the issuance of an injunction to restrain the officers of the Land Department from allowing filings. That case is entitled

Sioux City and St. Paul Railroad Company vs. United States, 34 Federal Reporter 835.

On Appeal to the Supreme Court of the United States from the decision of Judge Deady in Jones vs. the United States, Judge Bradley says:

"These cases are suits in equity brought against the United States under the recent act of March 3, 1887, extending the jurisdiction of claims against the Government to the District and Circuit Courts of the United States. They are suits for specific performance, seeking to compel the United States to issue and deliver to the plaintiffs respectively patents for timber land, alleged to have been taken up and purchased by them under the act for the sale of timber lands in the states of California, Oregon, etc."

After discussing the provisions of this act and in concluding his opinion the Justice says:

"Of course, our province is construction only; the policy of the law is the perogative of the legislative department. But, notwithstanding the glowing terms in which able jurists have spoken of the progress of civilization and enlightened government as exhibited in subjecting government itself, equally with individuals, to the jurisdiction of its own courts, we should have been somewhat surprised to find that the administration of vast public interests, like that of the public lands, which belong so appropriately to the political department, had been cast upon the courts, which it surely would have been, if such a wide door had been opened for suing the government

to obtain patents and establish land claims, as the counsel for the appellees in these cases seem to imagine. We are satisfied that the door has not yet been thrown open thus wide."

To the same effect as the cases just cited are,

Marquez vs. Frisbie, 101 *United States Reports*, 473.

Litchfield vs. Register and Receiver, 9 *Wallace Reports*, 575.

Secretary vs. McGarrahan, 9 *Wallace Reports*, 298.

Many of the State Courts have in effect announced the same conclusion as that to which the Supreme Court of the United States has uniformly come. In an early case from the State of Mississippi, entitled

Dickinson vs. Brown, 9 *Smede's and Marshall's Reports*, 130,

the opinion of the Chief Justice on pages 135 6 7 is as follows:

"This was an action of ejectment for sixty-four acres of land, being part of Section No. 10, in Township No. 1, of Range 6, West. Brown, the plaintiff below, introduced a patent from the United States, for the land in question, dated 26th of April, 1843. The patent is not set out, nor is there anything to show the date of the entry on which it was made. To overreach this title, the defendant introduced a receipt from the Receiver of public money at Augusta, which is for the purchase money for the same land, dated 20th March, 1841. * * * As rebutting evidence, the plaintiff then offered the certificate of entry given by the Register on the above named receipt of the Receiver to Mathew Dickinson. The entry seems to have been made under the pre-emption law, and across the face of the certificate is the word 'cancelled.' To this is attached the certificate

of the Commissioner of the General Land Office, that it is a true and literal exemplification from the original on file in his office. To the introduction of this the defendant objected, but it was admitted. To prove that the cancellation was unauthorized by law, the defendant offered to introduce a correspondence between the land officers of this State and the Commissioner of the General Land Office in relation to Dickinson's right, of pre-emption. The Commissioner determined that it was good, and ordered the entry to be allowed, which was done. Brown being, as it would seem, interested, objected to the legality of the entry, and on his objection a further correspondence took place between the Land officers and the Commissioner, which resulted in an order to have testimony taken in regard to Dickinson's right, which was done, the result of which was that the Register and Receiver decided against Dickinson's right, and communicated their decision to the Commissioner, who approved it, cancelled the certificate, and directed the purchase money to be refunded. This evidence was excluded by the Court, because it did not prove that the certificate was cancelled contrary to law. * * *

"The plaintiff's patent was a legal title, sufficient to justify a recovery, without further or additional proof. The title set up by the defendant, was the certificate of the Receiver of public moneys, which was not in strictness even an entry; it was but an authority to enter. The entry is made with the Register, who gives a certificate But suppose this receipt is to be regarded as an entry, then, as against the Government is constituted but an equity. A Court of Chancery may give preference to a prior entry with a junior patent, because the equities alone are involved But is insisted that our statutes makes the certificate of the Receiver a legal title. It makes 'all certificates issued in pursuance of any act of Congress, by any Board of Commissioners, Register of a Land Office, or any other person or persons duly authorized to issue such certificate, founded on any warrant, or order of survey, or in right of any donation, pre-emption, or purchase from the United States, for any lands,' &c., a legal title, so far as to enable the holder to maintain an action thereon, and admissable in evidence as such. This statute makes the certificate but a substitute for a better

title. It does not profess to place it on an equal footing with a patent. The public lands belong to the United States, and Congress have declared what shall be the complete legal title. When that legal title passes it must be intrinsically superior to a mere entry. The State cannot say what mode the Government shall pursue in passing title. The certificate then, was the inferior title.

"BUT ADMITTING THAT IT CONSTITUTED A LEGAL TITLE, IT WAS IN PROOF THAT THE CERTIFICATE OF ENTRY HAD BEEN CANCELLED, AND WE CANNOT SAY THAT THE REGISTER AND RECEIVER, WITH THE APPROBATION OF THE COMMISSIONER OF THE GENERAL LAND OFFICE, HAD NO POWER TO CANCEL IT; ON THE CONTRARY, IT IS BELIEVED THAT SUCH POWER IS UNIFORMLY EXERCISED. TO A CERTAIN EXTENT THESE OFFICERS HAVE A DISCRETION IN SUCH MATTERS. THEY ARE EMPOWERED TO HEAR AND DECIDE ON AN APPLICATION FOR A PRE-EMPTION RIGHT. AS AGAINST THE GOVERNMENT, THE CERTIFICATE WAS BUT AN INCIPINET OR INCHOATE TITLE; THE OFFICERS DISCOVERED THAT IT HAS BEEN IMPROVIDENTLY ISSUED, AND CANCELED IT, and issued a complete legal title to another; and refunded, or offered to refund, the money paid; and it was competent for the plaintiff to prove this statement of facts."

Our own Supreme Court in the case of

Hays vs. Parker, 2 Washington Territory Reports, page 198,

in an opinion rendered by Justice Hoyt, says on page 202:

"This was an action of ejectment brought by the defendant in error, who alleged in his complaint that he was entitled to the land by virtue of a certificate of purchase issued by a receiver of Public Moneys of the United States. The defendant in the Court below, as a part of his answer, set up the existence of certain facts tending to show that said certificate was illegally issued; and that on account of such illegality, the Commissioner of the General Land Office had cancelled said certificate. The Court, on motion of plaintiff, struck out all that was

alleged in the answer as leading to the action of the said Commissioner in so cancelling said certificate; and this, we think, was error, as in our opinion such allegations were proper by way of inducement, and defendant should have been allowed to prove them as matter of explanation of the Commissioner's said action.

"Besides, we think the letter of said Commissioner, offered in evidence by the defendant, should have been admitted, as tending to prove that the cancellation of said certificate and its exclusion was error, which entitles defendant to a new trial.

"*But we find from the evidence, that it appeared by the testimony of both parties that at the time this suit was commenced, the claims of the respective parties thereto to the land in question were being waged in the Department of the Interior of the United States; and this fact being conceded, as we think it is by the record in this case, it was not proper for the Court to interfere to aid either party (by way of affirmative relief,) until the matter had been fully determined by the executive branch of the Government; and upon this fact appearing to the Court, it should have dismissed the cause at the cost of the plaintiff; and its refusal or failure so to do was error, for which the judgment and verdict must be set aside.*

These cases and others to which we shall have occasion to call attention later on hold in effect that until a patent is issued that the entire matter of the disposition of the public lands is subject to the control of the Land Department exclusively because until the patent is issued the Land Office may reverse its former decisions and the presumption as to public officers is that they will do their duty and issue the patent to the one who is rightfully entitled to it. So that although as between two parties applying for the same land the Department may in the first instance give the certificate to one, it may nevertheless and while the matter is within their control cancel this certificate and issue a certificate to the other

party, and notwithstanding this they may if they discover that they have been imposed upon by fraud and by concealment of the party to whom they last issued a certificate issue a patent to the man to whom they first issued the certificate. There is less reason for the interference of the Courts in this case than there was in any of the cases which have been brought in the Courts in which it has been held that the Courts could not interfere. In nearly all the cases which we have been able to find the complaints have contained charges of fraud either on the part of the successful party before the Land Office or on the part of the officers themselves. These charges of fraud are often times very strong and if in any case it would be proper for the Courts to interfere such a case where the Land Office has been imposed upon by the fraud of the successful party or where it itself had fraudulently allowed an entry would seem to be a case which would appeal very strongly to the interference of the Courts; but the Court will observe in this case that there is no charge made by the plaintiff in error. He does not claim that the testimony by which his certificate was cancelled was perjured or that the officers of the Land Office acted fraudulently, he rests his case on the proposition that the Land Office after it had issued to him a certificate had no further duty or right in the premises but to issue him a patent. He admits that the defendant in error claimed in his affidavit that plaintiff in error at no time established his residence on the land. He admits that the Register and Receiver so found; that the Commissioner so found, and that the Secretary of the Interior so found. The finding was one of fact and is conclusive unless it is shown that the testimony by which

that fact was found was itself perjured. Counsel in his brief has some very plausible statements in regard to the hardships to which the party is subject in making contest before the Land Office. He thinks that because a party cannot have compulsory process to obtain the attendance of his witnesses, and because, as he says, "the oath administered to witnesses is not of such character as that perjury can be committed" is an insuperable objection to the Land Office exercising such powers. The plaintiff in error could not have been perjured in this regard for the rules of practice of the Land Department provide that testimony may be taken by deposition in the following cases:

1st. Where the witness is unable from age, infirmity or sickness or shall refuse to attend the hearing at the local Land Office.

2nd. Where the witness resides more than fifty miles from the place of trial.

3rd. Where the witness resides out of or is about to leave the State or Territory or is absent therefrom.

4th. Where from any cause it is apprehended that the witness will be unable or will refuse to attend.

These are substantially the same provisions as we have in our state statues and we have never understood that a party was not able to properly present his cause because required to take the testimony of any of his witnesses by deposition. Again the rules provide for continuances, which may be allowed on the day of trial on account of the absence of material witnesses, when the party asking for the continuance makes an affidavit before the Register and Receiver showing that one or

more of the witnesses in his behalf is absent without his procurement or consent; the name and residence of each witness; the facts to which they would testify, if present; the materiality of the evidence; the exercise of proper diligence to procure the attendance of absent witnesses; and that affiant believes said witnesses can be had at the time to which it is sought to have the trial postponed. In addition to this the rules provide that a motion for a new trial may be made before the Commissioner and we presume that the practice on such a motion is similar to that in Courts and that if the losing party is able to show newly discovered testimony that the Commissioner would remand the case to the Register and Receiver for the purpose of hearing such testimony. We think that the rules of the department allow a party every opportunity to preset his case fairly and without any obstruction to or abridgement of his rights. And it appears in this case that plaintiff in error had every right to which the law entitled him. He had a hearing before three different tribunals, every one of which concurred in holding that "he at no time established his residence on the premises embraced in his said cash entry." As to the question of the sanctity of the oath administered in such cases, we have no decisions to show whether false swearing would be perjury within the meaning of our statute, but we presume that where the law provides for the trial of any question that any statement made under oath or affirmation which is false is as much perjury as if the statute had directly provided for the administering of an oath in such case. In this case there is no allegation in the reply that plaintiff in error was prevented from having a fair trial before the Register and Receiver; there is

no allegation that he was prevented from obtaining the presence of his witnesses; nothing of this sort. The question is narrowed down to one of mere authority.

II.

The next question that presents itself is the one that counsel for plaintiff in error have so elaborately argued in their brief. We understand their contention to be that when a parly makes proof to the satisfaction to the Register and Receiver and as evidence of this fact they issue to him a certificate that neither the Register and Receiver nor the Commissioner of the General Land Office nor the Secretary of the Interior can cancel this certificate, suspend the entry or require additional testimony touching his entry or allowing a third party to contest his proof. We believe that this is the proposition weich counsel have labored so earnestly to sustain. We take issue with them on this question and assert as a proposition of law:

THAT UNTIL THE ISSUANCE OF PATENT THE COMMISSIONER OF THE GENERAL LAND OFFICE MAY SUSPEND AN ENTRY AND PLACE THE PRE-EMPTION CLAIMANT IN THE SAME POSITION THAT HE WAS PRIOR TO THE OFFERING OF PROOF; AND THAT ON SAID SECOND HEARING THE GOVERNMENT CAN ITSELF, THROUGH ITS OFFICERS AND AGENTS OR BY THE EFFORTS OF AN INFORMER RE-EXAMINE THE QUESTION AS TO THE PRE-EMPTION CLAIMANT'S COMPLIANCE WITH THE LAW, AND IF ON SAID HEARING IT IS SHOWN THAT THE CLAIMANT HAS NOT COMPLIED WITH THE LAW, THAT THE COMMISSIONER OF THE GENERAL LAND OFFICE MAY CANCEL THE ENTRY AND ALLOW ANY PERSON TO FILE A DECLARATORY STATEMENT FOR

THE SAME, AND AFTER COMPLIANCE WITH THE LAW PERMIT HIM TO ENTER IT.

Right here we desire to place before the Court what we believe the authorities lay down as law regarding the rights of a party holding a certificate issued by the Register and Receiver. We make this showing at this time because counsel have with much ingenuity so culled their authorities and their extracts from the authorities as to give an impression at first blush that a certificate is equivalent to a patent and that the issuance of a patent is a mere ministerial act which follows as a matter of course from the prior issuance of a certificate. Many of their cases arose at a time when lands were entered at private sale, where nothing but the payment of the Government price was necessary; when neither residence, cultivation or improvements were required. In such cases, it may perhaps be said with much reason that the Government having offered land at private sale is bound by a sale made by its authorized agents and that in such case the issuance of a certificate is equivalent to a patent, but in a case like the present where the Government bestows its bounty upon one who possesses certain qualifications and who performs the conditions precedent prescribed by law, that it is the compliance with these requirements that operates to divest the Government of its title and that where the conditions have not been performed, and a claimant through fraud and perjury makes facts seem to exist which do not in fact exist, that in such case the Government at any time may proceed ro cancel a certificate issued because of the fraud of the pre-emption claimant. Nor can a party complain of this right on the part of the Government to

choose its own time and tribunal for the ascertainment of the truth; it is the policy of the Government to encourage settlement, the tilling of the earth and the improvement and the developement of its resources, but while this is true it is also true that the Government does not offer this to those who will not accept its offer in the spirit in which it is tendered. It is to the *bona fide* settler that the Government offers this land. If he has complied with the law no power on earth can prevent him from showing this fact, either in the Land Department or in the Courts. While it may be a hardship on him at times to be compelled to substantiate proof that he has already made still this is one of the inconveniences to which every citizen is subject. Where a man has not complied with the law but has by perjury made it to appear that he has complied with the law and the Government has issued to him a certificate it can upon discovering the fraud and imposition avoid its action, but the Government does not proceed in these matters oppresively or summarily. It offers to a party who has made this proof which is attacked an opportunity to meet such charges and to disprove them. It allows him, in case he is unsuccessful, an appeal to the Commissioner of the General Land Office and jealous of the rights of its citizens to have an impartial decision of matters in dispute; it permits an appeal to an officer who has heretofore had no part in the controversy, and not resting even here it vests in the chief executive, the President of the United States, the right to investigate the matter. The method of procedure in the land office is simple. The technicle requirements of the Courts of Justice are not found here. We think it may be safely said that the land office, in its prac-

tice, approaches more nearly to the practice of Courts of Equity than to any other practice. The public lands are divided into districts, in each of which a Register and Receiver are appointed. The district often comprises a domain covering thousands of miles. It is impossible, especially in this state where there is so much unoccupied land, and where the lands are so heavily timbered, for anyone connected with the Government to ascertain, in each case, whether the pre-emption claimant has complied with the law or not. He gives notice to the Register and Receiver that he is prepared to make his final proof, and he gives the names of his witnesses who are, generally, speaking, neighbors; the Register thereupon causes notice to be published, that the claimant will make his final proof on a certain day. When the day arrives a stereotyped set of questions is presented to him for answer. If the answers are satisfactory, the Register and Receiver issue him his certificate. Thereupon the proof is transmitted to the Commissioner of the General Land Office. If this transmission of proof is not intended for the purpose of allowing the Commissioner as supervisor to act as a check upon the Register and Receiver, then we are unable to perceive why it is required. While the matter remains in the hands of the Commissioner for his decision as to whether he will issue a patent or not, it is certainly competent for him of his own motion, or upon the suggestion of anyone, whether it be a special agent of the Department or a common informer, to order a rehearing. There is no fear that this power of supervision of the Commissioner of the General Land Office will be exercised in improper cases. In the rules which the Secretary of the Interior has prescribed, provision has been

made for contest only in certain cases, and these cases DO NOT embrace a contest by a party standing in the position of the defendant in error in this case. We do not place this action of the Commissioner of the General Land Office, in allowing a private party, having no interest in the matter, to contest the entry of the plaintiff in error upon any special provision of the statute, or even of the rules of the Land Department. We do not believe that the Land Department is compelled to recognize a common informer or to reward his efforts to disclose fraud and perjury by giving him a preference right to the land which has, through his efforts, been again thrown open for settlement. We do not desire to take any position before this Court which we cannot support. We desire to remove at this time any impression on the part of the Court or of Counsel that there is any claim on our part that this was a contest in the ordinary acceptation of the term, and as provided by the statutes and by the rules of the Department. We claim nothing more for the defendant in error in this case than that he was a common informer, or, as he is termed by the decisions, a "protestant," and in our opinion it would have made no difference so far as the plaintiff in error is concerned, that the defendant in error was qualified to enter lands under any of the laws of the United States or not. We do not claim that the defendant in error was a party in interest. All that we do claim for him is that he informed the Land Department that the plaintiff in error had, by the grossest fraud and perjury, imposed upon its officers. That while he had pretended to have complied with the law, he had not, in fact, done so; that the testimony by which he had made it appear, to the satisfaction of the Register and

Receiver that he had complied with the law, was a tissue of falsehood, and that but for this false testimony a certificate would never have been issued. This was drawn to the attention of the Commissioner in such a manner, although not provided for by law or by rule, that the Commissioner in his capacity as a supervising officer of the Register and Receiver, deemed it proper to lay these charges before the Register and Receiver, and while they were investigating the matter to suspend the cash entry of plaintiff in error. While defendant in error might have hoped, in case he was successful in having the entry of plaintiff in error cancelled, that he would be permitted to enter this land himself, still he had no guarantee that he would be thus allowed. In fact, we believe that if pending these proceedings a third party had established his residence upon the land in dispute, and had offered his declaratory statement, that in a contest between him and the defendant in error the Register and Receiver, and all the officers of the Land Department would have been compelled to have recognized said third party as having a prior right in the premises. Had the decision of the Register and Receiver been in favor of plaintiff in error, defendant in error could not have appealed. He was acting under the government and could not control the case.

Martin vs. Barker, 6 L. D., 763.
L. E. McGary, 12 Copps, L. O., 18.
James McCone, Id. 238.
Cerro Bonito, Q. M., 5 Copps, L. O., 3.

As a matter of fact, the defendant in error was allowed to make a homestead filing upon the land, and it is because of this allowance, that he is now the defendant in

this case. We believe that our position in this matter cannot be misunderstood; we have attempted to state it as clearly as language will permit, and we reiterate that this action on the part of the Commissioner of the General Land Office must be considered and taken as if defendant in error had never appeared in the matter at all. We proceed now to a consideration of the authorities which we believe sustain us in the position that we have taken.

In the case of

Frisbie vs. Whitney, 9 Wallace Reports, page 187,

the Court, at page 194, has this to say:

"The act of Congress on this subject, to which all the subsequent acts refer, and which prescribed the terms and the manner of securing title in such cases, is the act of September 4th, 1841. That was an act full of generosity, for it gave the proceeds of the sale of all the public lands to the States. The tenth section of the act provides that any person of the class therein described who shall make a settlement upon public lands of a defined character, and who shall inhabit and improve the same, and who shall erect a dwelling thereon, shall be authorized to enter with the Register of the proper Land Office, by legal subdivisions, one-quarter section of said land, to include the residence of the claimant, upon paying the minimum price of such land. Section eleven provides that conflicting claims for pre-emption shall be settled by the Register and Receiver; section twelve, that prior to such entry proof of the settlement and improvement required shall be made to the satisfaction of the Register and Receiver; and section thirteen requires an oath to be made by the claimant before entry; section fifteen requires a person settling on land with a view to pre-emption, to file within a limited time, a statement of this intention and a description of the land.

"*When all these prerequisites are complied with, and the claimant has paid the price of the land, he is entitled to a*

certificate of entry from the Register and Receiver; and after a reasonable time, to enable the land officer to ascertain if there are superior claims, and if in other respects the claimant has made out his case, he IS ENTITLED TO RECEIVE A PATENT, WHICH FOR THE FIRST TIME INVESTS HIM WITH THE LEGAL TITLE TO THE LAND."

In the case of

Harkness vs. Underhill, 1 Black Reports, 316.

it appeared that one Waters went out upon the land as a pre-emptor under the act of 1832; he put up what was styled a "pen" without any roof and in which he slept only one night. Waters offered to prove up and produced his own and the affidavits of other witnesses to the local Land Office tending to show residence, cultivation, etc., but his application to enter was denied upon the ground that the surveys were not extended over the land. Waters subsequently died without proving up and his heirs perfected the entry and obtained the usual certificates. Stillman subsequently informed the Commissioner of Waters' failure to reside upon and cultivate the land and thereupon the Commissioner instructed the Local Officers that if they believed the facts as respects the frauds practiced to obtain the entry in Waters' name to treat it as void for fraud and to allow Stillman's heirs to enter the land. The Register and Receiver cancelled the entry of the heirs of Waters and allowed the heirs of Stillman to enter the land. This is substantially such a case as is presented here. Counsel for the parties claiming from Waters contended that the Register and Receiver having sold the land to Waters in conformity with the instructions of the Commissioner of the General Land Office, had no further power or jurisdiction over it,

neither had the Commissioner of the General Land Office power to set aside the sale even for fraud, this could only be done by judicial authority. Counsel for parties claiming under Stillman contended that no one but a settler and a house-keeper on the land was entitled to a right of pre-emption under the act of April 5, 1832. Waters was not a settler or house-keeper. He had, therefore, no right—no title—nothing but a fraudulent claim, wholly worthless and void. That being its character, the Register and Receiver and Commissioner of the General Land Office had authority to rescind, set aside, and treat as a nullity the entry made by his heirs on the false proofs produced by him in his lifetime. As Waters' entry did not give him the title, it was still in the United States, and the Land Office was justified in permitting Stillman's heirs to enter it.

The Supreme Court agreed with Counsel who contended for the latter doctrine and say:

"The question is again raised, whether this entry, having been allowed by the Register and Receiver, could be set aside by the Commissioner."

"This question has several times been raised and decided in this Court, upholding the Commissioner's powers."

In the case of

Barnard's Heirs vs. Ashley's Heirs, 18 Howard's Reports, page 43,

the Court, on pages 44 and 45, says:

"In cases arising under the pre-emption laws of the 29th of May, 1830, and of the 19th of June, 1834, the power of ascertaining and deciding on the facts which entitled a party to the right of pre-emption was vested in

the Register and Receiver of the land district in which the land was situated, from whose decision there was no direct appeal to higher authority. BUT, EVEN UNDER THESE LAWS, THE PROOF ON WHICH THE CLAIM WAS TO REST WAS TO BE MADE 'AGREEABLY TO THE RULES TO BE PRESCRIBED BY THE COMMISSIONER OF THE GENERAL LAND OFFICE;' AND, IF NOT SO MADE, THE ENTRY WOULD BE SUSPENDED, WHEN THE PROCEEDING WAS BROUGHT BEFORE THE COMMISSIONER BY AN OPPOSING CLAIMANT. In cases, however, like the one before us, where an entry had been allowed on *ex parte* affidavits, which were impeached, and the land claimed by another founded on an opposing entry, the course pursued at the General Land Office was to return the proofs and allegations, in opposition to the entry, to the District Office, with instructions to call all the parties before the Register and Receiver, with a view of instituting an inquiry into the matters charged; allowing each party, on due notice, an opportunity of cross-examining witnesses of the other, each being allowed to introduce proofs; and, on the close of the investigation, the Register and Receiver were instructed to report the proceeding to the General Land Office, with their opinion as to the effect of the proof, and the case made by the additional testimony. And, on this return, the Commissioner does in fact exercise a supervision over the acts of Register and Receiver. This power of revision is exercised by virtue of the act of July 4, 1836, which provides 'that, from and after the passage of this act, the executive duties now prescribed, or which may hereafter be prescribed by law, appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands; and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States.' THE NECESSITY OF 'SUPERVISION AND CONTROL,' VESTED IN THE COMMISSIONER, ACTING UNDER THE DIRECTION OF THE PRESIDENT, IS TOO MANIFEST TO REQUIRE COMMENT, FURTHER THAN TO SAY THAT THE FACTS FOUND IN THIS RECORD SHOW THAT NOTHING IS MORE EASILY DONE THAN APPARENTLY TO ESTABLISH, BY EXPARTE

AFFIDAVITS, CULTIVATION AND POSSESSION OF PARTICULAR QUARTER SECTIONS OF LAND, WHEN THE FACT IS UNTRUE. * * *

"The case relied on, of Wilcox vs. Jackson, 13 Pet, 511, was an ejectment suit, commenced in February, 1836; and as to the acts of the Register and Receiver, in allowing the entry in that case, the Commissioner had no power of supervision, such as was given to him by the act of July 4, 1836, after the cause was in court."

In the case of

Hestres vs. Brennan, 50 California Reports, 211,

the Court, on page 217, says:

"The act of Congress establishing the Department of the Interior confers upon the Secretary the supervision of public business relating to several subjects, among which is that of the public lands. The Commissioner of the General Land Office is vested with authority to perform executive duties appertaining to the survey, sale, etc., of the public lands, 'under the direction of the Secretary of the Interior; and the subordinate officers of the Land Department are subject to the supervision of the Commissioner. (Revised Stats. U. S., Secs. 441, 453 and 2,478.) BOTH THE SECRETARY OF THE INTERIOR AND THE COMMISSIONER, IN REVISING THE ACTS OF THE SUBORDINATE OFFICIALS OF THE LAND DEPARTMENT, EXERCISE SUPERVISORY RATHER THAN APPELLATE POWER, IN THE SENSE IN WHICH THE TERM APPELLATE IS EMPLOYED IN DEFINING THE POWERS OF COURTS OF JUSTICE. The Secretary of the Interior, in the exercise of such authority, may approve, modify or annul the acts, proceedings and decisions of the Commissioner."

In the case of

Randall vs. Edert, 7 Minnesota Reports, 359,

the Court, in speaking of the powers of the Commissioner, on pages 363-4-5, says:

"Every one who purchases land from the United States by pre-emption or private entry, does so subject to the rules and regulations that govern the Land Department. All entries are made subject to the 'supervision and con-

trol of the Commissioner of the General Land office,' and all contests are decided by the local officers, subject to appeal. *An entry may be satisfactory to the Register and Receiver, and, when returned to and supervised by the Commissioner, be found defective in some material points, which will either suspend the issuance of the patent, or cancel the entry entirely.* And every decision of the local officers upon contested entries may be reversed by the upper office on appeal. All parties who purchase from a pre-emptor prior to the consummation of the entry take subject to the power of the upper office to confirm or cancel, the same that existed in relation to the original purchaser. In this case all that appears is, that Hammond, in July, 1855, pre-empted the land in dispute and sold the same to Mary Cressey, and that after several transfers, the land was purchased by the plaintiff on the seventh day of August, 1861, which was after the cancellation of the pre-emption entry; that Hammond's entry was cancelled by the General Land Office in August, 1858, as conflicting with the approved pre-emption claim of Jasper Gelhage; and that in August, 1861, a patent was issued by the United States for the same land to one of the defendants. The only inference that can be drawn from these facts is, that Hammond's entry was not in accordance with law, and that Gelhage had prior and paramount rights with which it conflicted, and that notwithstanding the entry was allowed by the local officers, it did not meet the approval of the upper office, which was essential to its validity. Every intendment must be made in favor of the officers having done their duty, when nothing appears to the contrary. We are bound to presume that the case went regularly from the local office to the upper, by return or appeal, and was there regularly acted upon."

And the Court next proceeds to show that the case of

Camp vs. Smith, 2 Minnesota Reports, 138,

and from which counsel for plaintiff in error have quoted so largely on pages 53, 55 and 56 of their brief, is not in conflict with the decision they are rendering, for they proceed to say:

"The plaintiff cites our decision in the case of Camp vs. Smith, 2 Minnesota, (155), to show that the title passed out of the United States at the time of the entry by Hammond, and that the department had no further control over it. The counsel has mistaken the nature of that decision. In that case, the pre-emptor conveyed the land, between the time of the entry and the issuing of the patent, but the entry was never disturbed, and was subsequently ratified and the patent issued to the pre-emptor. The question simply was, whether the deed made before the issuance of the patent was valid to pass the interest that the pre emptor had gained by virtue of his entry; we held that it was. Had the entry not received the confirmation of the upper office, the title would have failed, and the grantee been left to his covenants for redress. When, however, it was confirmed, the title passed to the pre-emptor's grantee by operation of the covenant of warranty in the deed. The essential difference between the case cited, and the one at bar, is, that in the former, the pre-emptor had conformed to the law and acquired rights under his entry, which passed to his grantee, and, in the latter, he had failed to acquire any rights, and, consequently, had none to transmit."

And in line with this decision is the case of

Gray vs. Stockton, 8 Minnesota Reports, page 472,

and the Court, on page 478, says:

"The issue of fraud is found against the defendants, so far, at least, as Elizabeth Gray is concerned, and there is no ground to disturb such finding on the evidence. Aside from this issue, the answer does not state facts sufficient to show that the legal title to the land ever vested in Howell, but, on the contrary, shows that he never did make a valid pre emption, and did not comply with the laws of the United States, in relation to pre-emptions, and consequently was never entitled to a patent, or in fact any evidence of title from the Government. By his own showing, the duplicate which he received from the local land officers at Winona, was improperly granted, and consequently it is unnecessary to consider what might have been his rights under such evidence of title and our

statute relating thereto, had all the requisites required by law to complete his pre-emption been complied with. The remarks and reasoning on the subject of the rights of pre-emptors, in Camp vs. Smith, 2 Minn. (156), upon receiving a duplicate, are all based upon the assumption that the pre-emptor has complied with the requirements of the pre-emption law. Every one who purchases land from the United States by pre-emption or private entry, does so, subject to the rules and regulations that govern the land department. All entries are made subject to the supervision and control of the Commissioner of the General Land Office, and all contests are decided by the local land officers, subject to appeal. Randall vs. Edert, 7 Minn. (450) And in the same case it was held, that 'all parties who purchase from a pre-emptor prior to the consummation of the entry, take, subject to the power of the upper office to confirm or cancel the entry that existed in relation to the original purchaser' These views dispose of the material points in the case, and the judgment below must be affirmed."

The case of

Judd vs. Randall, also from Minnesota,

but reported in

29 Northwestern Reporter, 589,

is a somewhat peculiar case, and is, we think, entitled to a great deal of consideration by this Court, because the Court, while desiring to hold contrary to what it did, yet found that the practice of the Land Department had become so fixed and had been supported so strongly by the Courts that it felt constrained to follow this practice rather taan yield to its own feelings.

In that case it appeared that one Andrews entered the land as a homestead; that he made final proof and received his certificate and conveyed the land to Randall, and Randall conveyed to Judd; Judd conveyed to one Tuttle. Four years after the certificate had been issued,

one Bray presented to the Commissioner of the General Land Office an affidavit, and the Commissioner ordered a hearing before the Register and Receiver, upon the point as to whether the entry and final proof of Andrews had been fraudulent or obtained by perjury. Such a hearing was had and the evidence produced was reported to the Commissioner of the General Land Office by the Register and Receiver, with the recommendation that by them that the entry be cancelled, and the Commissioner ordered Andrews' entry and final receipt to be cancelled. The action arose on a claim for a breach of warranty. We desire to quote from the opinion of the Judge in that case:

"The conclusion of the learned judge now under review, denying a right of recovery, is based upon his decision that the action of the officers of the Land Department, assuming to annul and cancel Andrew's entry, and the proceedings resulting in that end, were unauthorized and void. The correctness of this decision is the principal question presented before us. If we were not constrained by the consideration to which we are about to allude, it is probable that our decision would be in accordance with that under view; but, without setting forth the reasons which lead our minds towards that conclusion, we will state briefly the grounds of our decision to the contrary.

"It has long been the practice of the Land Department, in administering the various laws for the disposition of the public lands, even after final proof and the issuing of the proper final certificate or receipt, and after the appointed proceedings with reference to making such proof have terminated, but before the issuing of a patent, to entertain proceedings anew, upon evidence produced before the Commissioner of the General Land Office, going to show that the entry had been fraudulently made and completed, to order an investigation, and, upon proof of fraud, such entries have been cancelled. Zabr. Land Laws, 505; 1 Copp, Land Owner, 123, 124; 2 Copp, Land Owner, 54; Copp, Land Laws, 221; 6 Copp, Land Owner, 189; Copp, Land Laws, 421-919; 11 Copp, Land Owner, 181;

12 Copp, Land Owner, 70, 158, 170, 226, 250, 265, 289; 13 Copp, Land Owner, 13.

"This practice seems to have been sanctioned by the Supreme Court of the United States, in Harkness vs. Underhill, 1 Black, 316, 325, and by this Court in Gray vs. Stockton, 8 Minn, 529 (Gil 472.) The record in the latter case shows that the hearing which resulted in the cancellation of Howell's entry was ordered by the Commissioner of the General Land Office some three years after Howell had perfected his pre-emption entry, and received his final certificate. It shows, also, that his proof before the land officers in April, 1885, by which his claim was originally established, included his affidavit that he had declared his intention to become a citizen of the United States.

"We feel that we are compelled, by these adjudications in support of the established practice, to affirm the existence of the power in question, until the subject shall be further considered by the Supreme Court of the United States, whose decisions concerning it are of paramount authority."

In the case of

Darcy vs. McCarthy, 12 Pacific Reporter, 104,

it appeared that Darcy had been permitted to enter certain lands and a certificate was issued to him. Subsequently it came to the attention of the Commissioner that the entry had been improperly allowed and he directed the Register and Receiver to cancel it; a new certificate was thereupon issued to McCarthy, and the Court in passing upon the question raised in that case, say, on pages 105–6:

"It is also claimed that the action of the Register and Receiver in allowing the cash entry of the plaintiff is conclusive on the Land Department, and that the Commissioner had no authority to do that which his letter attempted to do. Although proof of the right to enter land must be made to the satisfaction of the Register and Receiver, they are not the final arbiters of such right.

They make returns of entries of land to the General Land Office, which is under the charge of the Commissioner. That officer has supervisory control over the subordinate officers in the Land Department, and can revise and correct their decisions. The entry relied on by the plaintiff was allowed by mistake, and without authority of law, and it was clearly competent for the Commissioner to cancel and set it aside. Bellows vs. Todd 34 Iowa, 31. It seems that before the entry was made the plaintiff and defendant had both settled upon, and were seeking to acquire title to, this land. The plaintiff then claimed it under a homestead entry, but the defendant instituted a contest which resulted in the decision made October 30, 1882, cancelling the entry. Under an act of Congress, this gave McCarthy, the successful contestant, thirty days in which to enter the same land. 21 U. S. St. at Large, c 89, 2. During this time a preference was given to the defendant, which was availed of and exercised by him on November 11, 1882, when he made a homestead entry. This homestead entry gave the defendant the superior right, and barred the plaintiff from acquiring any right to the land until the entry was contested and cancelled. Notwithstanding this, the officers of the Land Department, through a mistake, permitted a filing to be made on the land by the plaintiff on December 12, 1882, in which he claims settlement on November 6, 1882. As the land had already been taken, and was not subject to entry by the plaintiff, this mistaken action of the officers gave him no right.

"*It is argued for the plaintiff that under section 383 of the Code his duplicate receipt is proof of title against all but the holder of the actual patent, which is not in the hands of the defendant. This is a rule of evidence prescribed by the Code, and is applicable in a controversy between citizens, where the duplicate receipt is held with the concurrence of the United States authorities.* The title to the public lands belongs to the United States, and Congress is given full authority to dispose of the lands, and to make all needful rules rnd regulations respecting the same. Sec. 3, Art. 4, Const. U. S. A Land Department has been created by Congress, and rules prescribed for the disposal of the public lands, and to the officers of that Department the duty of selling and disposing of the lands is committed. They can only sell or dispose of

these lands in the manner prescribed by Congress. In disposing of them there are doubtless many mistakes made, BUT THE MATTER IS WITHIN THE CONTROL OF THE LAND DEPARTMENT UNTIL THE PATENT ISSUES, AND THE MISTAKES MAY BE CORRECTED BY THE OFFICERS OF THAT DEPARTMENT. The entry of the plaintiff, having been made without authority, was rightfully cancelled and set aside by the Commisoner, and the effect of the duplicate receipt, the evidence of title, was destroyed. It being within the scope of the duties of the Commissioner to make the correction, and to cancel the erroeous entry, it will be presumed, in the absense of evidence to the contrary, that it was done in accordanc e with the rules governing such action, and upon sufficient evidence: His action left the whole matter before the Land Department of the government for adjustment, where the rights of the parties could be further contested, and an appeal from the decision of the Commissioner could be taken to the Secretary of the Interior. Whatever may be the status of the controversy between the parties there, it is plain, from the evidence in the record here, that the plaintiff was not entitled to recover."

There are many other authorities to the same point as those from which we have already quoted, and as we regard the principle for which we have contended as being firmly established we forbear to cumber the brief with any further quotations; we cite simply,

Morton vs. Green, 2 *Nebraska Reports*, 441.

Forbes vs. Driscoll, 31 *Northwestern Reporter*, 633.

Bellows vs. Todd, 34 *Iowa Reports*, 18.

Gray vs. McCance, 14 *Illinois Reports*, 343.

McLane vs. Bovee, 35 *Wisconsin Reports*, 27.

Figg vs. Hensley, 52 *California*, 299.

Shepley vs. Cowan, 91 *United States Reports*, 330.

Moore vs. Robbins, 96 *United States Reports*, 530.

Quinby vs. Conlan, 104 United States Reports, 420.

United States vs. Minor, 114 United States, 233.

Lee vs. Johnson, 116 United States Reports, 48.

Porter vs. Bishop, 6 Southern Reporter, 863.

United States vs. King, 22 Pacific Reporter, 498, and

Vantongeren vs. Heffernan, 38 Northwestern Reporter, 52 to 97,

in which is a review of all the authorities both federal and state on this point, and we feel that we might safely submit this cause on the argument of the Court in that opinion

Counsel for plaintiff in error rely solely on the certificate as evidence of title. We have with great diligence searched through the Chapter in the Revised Statute relating to pre-emptions but have been unable to find any authority on the part of the Register and Receiver to issue such an instrument. Nor is there anything in the rules of practice of the department or in the instructions of the Secretary or Commissioner authorizing the issuance of such an instrument or recognizing the validity of it. This, we think, indicates clearly so far as the land department is concerned that the certificate itself has no value save as a receipt of the money paid by the pre-emptor, and not being authorized by any law it certainly cannot have any validity as a muniment of title save where the statutes of the states may give it such effect for the purpose of protecting a *bona fide* pre-emptor in the possession of his claim as against a trespasser. It is evident that this is the view taken of this certificate by our own legislature, for we find

"In actions affecting real estate such certificate shall be *prima facie* evidence that the title to the land mentioned or described in such receipt is in the person or persons named therein." Code sec. 433.

Counsel, however, claim that it is conclusive evidence of title as against every one but the United States for they do concede that in an action brought by the United States to cancel the certificate that it would not be conclusive evidence. The instructions issued by the department of the Interior to the Registers and Receivers under the provisions of section 2263 Revised Statutes provides among other things,

"That failure to inhabit and improve the land in good faith as required by law renders the claim subject to contest and the entry to investigation and cancellation." Instruction 54.

And also, "That final proof in pre-emption cases must be made to the satisfaction of the Register and Receiver, whose decision, as in other cases, is subject to examination and review by this office" Instruction 55.

Counsel for plaintiff in error claim that the issuance of a certificate and the allowance of an entry by the Register and Receiver is in the nature of a judgment, and the Revised Statutes not having provided for a contest where no filing has been made previous to the making of proof by the pre-emption claimant that that action of the Register and Receiver is conclusive, but this leaves out of view the repeated decisions of the Supreme Court of the United States that the Commissioner of the General Land office is clothed with a power of supervision over the acts of the Register and Receiver and would in effect prevent the government from seeing that the public lands were disposed of in the manner provided by law. We do not believe that we can better express the theory upon

which Congress proceeds in the disposition of the public lands than by saying that it is the compliance with every requirement provided by Congress that gives a claimant any standing before the department. It is the fact of compliance and not the appearance of compliance that Congress says is sufficient. If then a claimant has complied with all the requirements of the statute he is entitled to a patent, and if the department for any reason should refuse to issue it to him and should issue it to some third party then we believe that the claimant could upon showing these facts in Court procure a decree that the patentee holds the title in trust for him, because in such a case the Court would simply be doing what Congress had already said should be done; but if a claimant has not in fact complied with the law, but has by his oath made it appear that he has, and thereby procures the favorable decision of the Register and Receiver, the land department at any time before it has issued a patent, upon discovering that the claimant had not complied with the law, would have the same power to cancel the entry improperly allowed as would the Register and Receiver in the first instance had the same proof been made before them. The result of counsel's argument, if sustained in the present case, would be as follows:

The plaintiff in error did not comply with the law, and he was therefore not entitled to a certificate of compliance with the law, but by some means he obtained from the Register and Receiver a certificate based upon the assumption that he had complied with the law; it coming subsequently to the knowledge of the Commissioner of the General Land Office that the plaintiff in error had not complied with the law, a hearing was had wherein it

was determined as a matter of fact that plaintiff in error had not complied with the law. This in effect shut out plaintiff in error from obtaining the bounty of the Government. As against it he had no rights whatever. The land again lapsed into the public domain and was subject to entry by any person who should comply with the law. The defendant in error thereupon entered upon the land and obtained a certificate from the Register and Receiver showing his compliance with the law; upon receiving this certificate, however, the plaintiff in error brings an action in ejectment against him and obtains a judgment of the State Court that he is the owner of the land and not the defendant in error. Subsequently the Interior Department having ascertained that the defendant in error had faithfully complied with the provisions of the law, and was entitled to a patent issues it to him. The government to whom originally belonged the land has by its solemn act declared that the defendant in error is the owner of it, but the State of Washington who never had any interest in the land declares that the plaintiff in error is the owner of the land and refuses to entertain any action on the part of defendant in error to obtain possession of it. Here then is a direct conflict between the Government of the United States and that of the State of Washington. The party to whom Congress said the patent should issue cannot avail himself of this privilege, while the party to whom Congress said the patent should not issue and who obtained no interest in the land is nevertheless in the full occupation and enjoyment of it and is sustained by the Courts of the State. A moment's reflection, we think, will convince any one that Congress never intended that such a conflict of authority should occur, but

worse than this defendant in error in such case would be absolutely precluded from proving his right to the land because of the certificate held by defendant in error. He would therefore be deprived of his property without due process of law. But on the other hand observe the guards thrown around the action of the land office by the Courts when the land department shall have issued a patent to the defendant in error; plaintiff in error may by an appropriate action in the Courts of this State contest the right of the defendant in error to hold this patent, and he may show that he has become entitled to this patent himself because of his having complied with the law before defendant in error had. But in such case it would be necessary for him to show that his right was unquestioned, and that it was through a mistake or through fraud that the patent was not issued to him, because if it were upon a decision of a question of fact which was in dispute, then, we think, the decision of the Department would be conclusive upon the Courts. It is rather singular that no case like the present has ever been decided by the Supreme Court of the United States or by any State Court, and that the only cases on record, except those decided by Judge Deady, arose after the patent had been issued to one of the parties.

We now proceed to discuss the authorities upon which counsel for plaintiff in error has relied:

It is upon the faithful compliance with the conditions which it has prescribed that the Government agrees to part with its title to the public lands. If, therefore, a party has not complied with the law and the regulations made in pursuance of the law the Government is not required to convey the lands, and for the same reason if

by fraud a claimant imposes upon the Government it can whenever it discovers the imposition take steps to nullifiy what it has done. We make this statement here before proceeding to discuss the authorities cited by plaintiff in error because we believe that this far counsel will agree with us. For we understand that while conceding that the Government has some rights they insist that the proceedure adopted in the present instance was not warranted by law. Now, we have, as we think, satisfactorily shown that at any time before the issuance of patent the Land Office can rectify errors it has committed through mistake or imposition or fraud, and we shall therefore confine ourselves principally to this point:

The case of

Wilcox vs. Jackson, 1 Peters Reports, 498,

cited by the counsel on page 24 of their brief, is not an authority in favor of the plaintiff in error, for that case arose before the passage of the act of July 4, 1836, giving the Commissioner the power of supervision which he now enjoys. Nor in that case was there any appeal from the decision of the Register and Receiver in allowing a contested entry; the statute not having made any provision for an appeal, and, of course, what was said in that opinion was solely with relation to the law as it then existed, and we do not contend for a minute that the decision was wrong.

In the case of

Carroll vs. Stafford, 3 Howard's Reports, 441,

cited by counsel on page 28 of their brief, was a case of purchase merely and not one where the law required settlement, residence and cultivation. As we have before

remarked, it would seem in such a case that the payment of money being all that the Government required is sufficient to vest title, and that where an entry has been perfected that the Department could not set aside the action of the Register and Receiver, unless it was shown that the land so sold was not subject to purchase. In view of the facts and the law applicable to that case we think the Court correctly decided.

In the case of

Lytle vs. State of Arkansas, 9 Howard's Reports, 314,

cited in the brief of counsel at page 29, the rights of the parties were governed by the pre-emption law of 1830, by which law the powers of the Commissioner of the Land Office did not extend to the supervision of the Register and Receiver, and furthermore no appeal was allowed in any case from the Register and Receiver to the Commissioner.

In the case of

Simmons vs. Wagner, 101, United States Reports, 260,

cited on page 31 of counsel's brief, the facts show that the right of the party was one obtained by purchase, and not by settlement or cultivation, and the remarks we have heretofore made in regard to the case of Carroll vs. Stafford apply here with equal force.

The case of

Witherspoon vs. Duncan, 4 Wallace Reporst, 210,

cited on the brief of counsel at page 32, was a case where the power to tax public lands after entry had been con-

tested. We have been unable to discover anything in this case which sustains the contention of counsel. The taxing power of a State acts directly against the land, and if the Government has issued a certificate showing that the holder of it is *prima facie* entitled to a patent to the lands the State government has authority to tax these lands, because the State is authorized to assume that the occupant is holding in harmony with the United States and because otherwise the State would be deprived of the revenue. As was said by counsel for defendant in error in that case:

"With such rights under a certificate of entry, it would be strange, if the lands for which this certificate was given, should not be subject to taxation. If an individual could purchase lands of the United States, settle, improve and cultivate them, on certificates of purchase, then, in case, from the neglect and delay of the proper Department, the patents are not issued for several years, the lands would be exempt from taxation, while lands adjoining were compelled to pay taxes, though their occupant was deriving no greater advantage from the possession and cultivation. A period of sixteen years elapses, during which time a party might have improved and cultivated the land, derived a subsistance from it, accumulated property on it, and well nigh worn out the land, and yet, he must not pay taxes. Such a thing is possible, and easily to be done. And if this be the law, there is a great consideration held out to induce persons not to get patents issued at all."

And in addition to this Justice Davis, in considering the question of rights of parties claiming under a certificate of purchase, and a certificate obtained by reason of residence and cultivation:

"In either case when the entry is made and certificate given the particular land is segregated from the mass of public lands and becomes private property. IN THE ONE CASE THE ENTRY IS COMPLETE WHEN THE MONEY IS

PAID," (that is where it is purely a cash entry) "IN THE OTHER WHEN THE REQUIRED PROOFS ARE FURNISHED," (that is where evidence of residence and cultivation is required). "IN NEITHER CAN THE PATENT BE WITHHELD IF THE ORIGINAL ENTRY WAS LAWFUL."

that is to say, if in the first instance the land was subject to purchase and if in the second instance the claimant had complied with the provisions of the law as to residence and cultivation, the Government will not withhold the patent.

And further on in the opinion he says:

"The claim was allowed, the selections made, and a certificate of entry given, and it was their duty to see that the taxes were paid. It is true, that the entry might be set aside at Washington; but this condition attaches to all entries of the public lands."

If this language does not indicate that the Land office at Washington has a right to cancel an entry allowed by the Register and Receiver, then we do not understand its purport. It is so plain a proposition that a holder of a certificate is entitled to be considered the owner for the purpose of protecting his possession of the land embraced in his entry, that the various states have made enactments providing that a party holding a certificate of entry may maintain ejectment against any person claiming the land, but that this would be equivalent to saying that the holder of the certificate is the absolute owner of the land would be nullyifying the repeated decisions of the Courts, which hold that until the patent is issued the title remains in the United States, which, although it is termed the holder of the legal title this expression must be considered with reference to the question whether or not the entryman has previously complied with the law so as to

entitle him to the patent. It is the holding of the certificate with the concurrence of the Government that gives him this right. But when the government has destroyed his evidence of title then surely no Court has authority to treat him as the owner.

The case of

Cornelius vs. Kessell, 9 Supreme Court Reporter, 122,

cited on page 34 and so much relied upon by counsel is not in their favor.

It is a fundamental principle of our Government that a party cannot be deprived of any right unless he has had an opportunity to appear and defend; and so far as the Land Department is concerned this principle has become established as a rule. The rules of the Department provide, that where no appeal is taken from the decision of the Register and Receiver to the Commissioner of the General Land Office the decision of the local officers will be considered final as to the facts of the case, and will be disturbed only where fraud or gross irregularity was suggested upon the face of the papers, where the decision is contrary to existing laws, or where it is not snown that the party against whom the decision was rendered was duly notified of the decision and of his right of appeal.

In the case just mentioned the entry was a private one, and it also appears that a forty-acre tract which was subject to entry was included with an eighty-acre tract which was reserved from sale. The Commissioner of the General Land Office instead of cancelling the entry as to the eighty acres cancelled the entry as to the entire tract.

Justice Field, in the course of his opinion, says :

"That in October, 1887, an order was made by the Commissioner of the General Land Office cancelling the entry of Davidson for the two tracts of land on the alleged ground that one of them, not the tract embracing the premises in controversy, was included in a prior grant to the State, and therefore was not subject to entry. THE ORDER OF CANCELLATION WAS MADE WITHOUT PREVIOUS NOTICE OF ANY KIND TO DAVIDSON OR ANY PARTY IN INTEREST UNDER THE ENTRY, AND THE PURCHASE MONEY PAID WAS NEVER RETURNED OR OFFERED TO HIM OR TO ANY OF HIS SUCCESSORS IN INTEREST."

And the Justice also recognizes the power of supervision possessed by the Commissioner of the General Land Office over the acts of the Register and Receiver of the local land offices in the disposition of the public lands; and he holds that such power of supervision is not to be exercised arbitrarily, but "only when the entry was made upon false testimony or without authority of law; it cannot be exercised so as to deprive any person of land lawfully entered and paid for."

Now in this case three very important factors appear: First—The holder of the certificate was lawfully entitled to forty acres; the Commissioner, however, regarding the entry as an entirety, not only cancelled it as to that which could not be lawfully entered but also as to the other tract properly entered. Second—The order of cancellation was made without any notice to the holder of the certificate and he therefore had no opportunity to appear and defend as to that tract to which he had a valid right. Third—The entry was lawful and was not procured by fraud or perjury.

In the case at bar it is admitted that the Register and Receiver, Commissioner and Secretary found that plaintiff in error had at no time established his residence upon

the land embraced in his cash entry. This was a finding that he had not complied with the law and was therefore not entitled to the certificate which he had obtained by making it appear to the Register and Receiver that he had complied with the law.

Now, this finding is evidence that one of three things must have existed. Either the original proof of the plaintiff in error showed that he had not established his residence upon the land, in which case the Commissioner of the General Land Office in examining the proofs would have discovered this fact and returned the proof for the purpose of having the Register and Receiver require the attendance of the plaintiff in error at the Land Office to make additional proof; or the original proof made by plaintiff in error was false; or that the proof introduced by defendant in error at the trial before the Register and Receiver was false. If the first supposition is correct then we think counsel will concede that the Commissioner had a right to order a hearing and that on this hearing any party might appear and introduce proof to show that plaintiff in error had in fact not complied with the law as to residence, just as they might when he first offered his proof. If the second supposition is true, then under the decision of Cornelius vs. Kessel, the Commissioner had an unquestioned right to order a re-hearing, and if the third supposition is correct then counsel should have alleged in his reply that the defeadant in error had procured the cancellation of the certificate of the plaintiff in error by fraud and imposition. The truth of any one of these suppositions is sufficient to show that this Court has no jurisdiction in the matter and that the officers of the Land Office were the exclusive judges of the fact.

But in the case just mentioned the authority of the Courts was not invoked until after the issuance of patent. The Court must presume in this case that the testimony of plaintiff in error was false and fraudulent, because, although the finding of fraud is denied by plaintiff in error, still the fact nevertheless remains that the facts brought out on the re-hearing were at total variance with those made at the time of entry, and in the absence of any allegation that the facts found on the re-hearing were false the presumption naturally arises that those at the time of entry were false, and that therefore the proof was fraudulent and the plaintiff in error committed fraud.

The case of

Smith vs. Ewing, 23 Federal Reporter 741,

Cited by counsel on page 36 of their brief, is a peculiar case. The decision is by Judge Deady and the facts, as nearly as we can state them, are as follows: One Webb settled upon the land in controversy as a pre-emptor; made declaratory statement therefor and after due publication of notice, made his final proof of settlement and improvement to the satisfaction of the Register and Receiver, paid for the land and received a certificate of purchase; that one D. K. Smith purchased said land from Webb in good faith and for a valuable consideration, and subsequently the plaintiff purchased the land from said Smith. It also appears that Ewing settled on the premises prior to the settlement by Webb, filed his declaratory statement therefor, and after entry by Webb applied to the Register and Receiver to contest the claim of Webb Thereafter the Commissoner of the General Land Office ordered a hearing which was had before the

Register and Receiver; thereupon they decided that neither Webb nor Ewing had complied with the pre-emption law in the matter of residence, cultivation and improvements, and recommended the cancellation of the filings and entries of both of said parties by the Commissioner. Webb appealed from this decision to the Commissioner, who affirmed the same, and from there he took the case to the Secretary of the Interior, who affirmed the decision of the Commissioner, and said filings and entries were canceled; that Ewing thereupon entered the land as a homestead; that this application was allowed and that he commenced to reside upon and cultivate said land as a homestead and has ever since continued to do the same. The same contention was made by the plaintiff in that case as here, and in many respects the facts in that case are similar to those here. Ewing had no interest in the land at the time that he instituted the proceedings against Webb, and the question in that case was as to the right of the Commissioner to cancel these entries without there having been a contest by a party having an interest in the land. Of course we have nothing to say to this decision further than it is not supported by authority. Judge Deady is not sustained in any of the statements which he makes and if the steps by which he is enabled to arrive at the conclusion he does are false, then, of course, by all rules of logic his conclusion is also false. After citing cases from the Supreme Court of the United States, holding that the issuance of a patent conveys the legal title, and that after its issuance all control of the executive department over the title ceases, he proceeds to claim that a certificate is on the same footing with a patent, notwithstanding the fact that all the authorities hold

that until the patent issues the legal title is still in the Government, and then he makes the astounding statement that the issuance of a patent is merely the exercise of a ministerial duty, although decisions of the Supreme Court of the United States have held that it was the exercise of a judicial discretion which could not be compelled by mandamus or restrained by injunction. We regard the decision as entirely unsupported by authority, and as a discussion of it involves the decision of the case at bar we may dismiss this decision with the remarks already made.

The case of

Wilson vs. Fine, 40 Federal Reporter, 52,

Is nothing more nor less than a [illegible] of what was said in the case of Smith vs. Ewing, and there as here the position is taken that after the issuance of the certificate all authority of the land department over the land and over the holder of the certificate ceases.

The case of

Camp vs. Smith, 2 Minnesota Reports, 138,

Cited by counsel, on pages 53 and 55, has been by subsequent decisions of the same State confined to the facts involved therein.

The case of

Perry vs. O'Hanlon, 11 Missouri Reports, 585,

Cited by counsel, cannot, we think, be considered an authority for plaintiff in error. In that case it appared that Perry under some special act filed his claim with the recorder of land titles for 639 acres. A portion of this tract on which his dwelling stood was supposed to have

been confirmed to him by an act of Congress. A commission was appointed to examine into claims of a like character. Before any action of the board was taken on his claim Perry attempted to avail himself of the pre-emption privileges granted to claimants who were willing to relinquish to the United States. This act it seems provided for two classes of claimants. One class were allowed a pre-emption, provided they were actual settlers and housekeeper. Claimants of the second class were allowed a pre-emption whether actual settlers or not, provided they would waive their claims and relinquish to the United States. The Register and Receiver allowed Perry's entry for the land which did not embrace his dwelling; it being represented to him at that time by these officers that that tract was confirmed to him and no action was necessary to be taken by them. Subsequently the Commissioner of the General Land Office, without any notice, and upon the ground that Perry was not an actual settler upon the land, directed the cirtificate of entry to be cancelled. Subsequently a patent issued to the defendant. In the first place the Commissioner had no power to cancel an entry without giving a party an opportunity to appear and show cause. In the second place the Commissioner committed a mistake in supposing that Perry had filed upon this land as a settler; the fact being that he had claimed it by virtue of a relinquishment of his claim under a previous act of Congress. We do not claim for one moment that if the case at bar presented the same state of facts but that plaintiff in error would be entitled to recover in this case, but in that case a patent had issued from the department by which the title of the Government had been divested and it was certainly com-

petent for a State Court to inquire into the matter, and if it ascertained that the certificate of Perry had been cancelled by a mistake of fact or of law it was perfectly competent for the Court to declare the holder of the patent the trustee for the person who had it primarily become entitled to it. The remarks made by the Court in that case as to the power of Courts and of the authority of the Commissioner of the General Land Office while being very broad in their scope must under the rules of construction be confined to the facts then before the Court.

The case of

Brill vs. Stiles, 35 Illinois, 305,

is not an authority for plaintiff in error. In that case it appeared that one Rockafeller under whom Brill claimed had purchased the land from the Government and had procured a certificate of purchase for the same. This was in substance a contract on the part of the Government to convey the land to the purchaser. Subsequent to the purchase the Commissioner of the General Land Office cancelled the certificate of purchase given to Rockafeller and one Soule under whom Stiles claimed entered the land and subsequently procured a patent to it. It did not appear upon what ground the Commissioner of the General Land Office cancelled the certificate of purchase. Under this state of facts we think the decision of the Court holding that the Commissioner of the General Land Office had no power to cancel the certificate of purchase and to issue a patent to another party whose claim was subsequent to that of the purchases is entirely correct. As the Court said, "a Commissioner of the General Land Office has no power to decree the rescission of

the contract. The purchase and sale of the land was a contract on the part of the Government which should have been consumated, and we think that the powers vested in the Commissioner of the General Land Office did not extend to the cancellation of the contract of purchase." The Court said, on page 309, "If the entry was authorized by law, the title passed to him (Rockafeller), subject only to be defeated by proof of a right of pre-emption, and if unauthorized, he acquired no title. But until it is shown to have been illegally made, or to have been defeated by proof of a pre-emption, the certificate of purchase was evidence of an equitable right.

The case of

Cady vs. Eighmy, 54 Iowa Reports, 615,

simply involves the question of the rights of the purchaser of lands from the holder of a certificate against a grantee of the holder of a certificate after the issuance of patent. The Court very properly holds that the purchaser of the equitable title is entitled to the benefit of the legal title when the patent issues, and that the patent when issued enured to the benefit of the purchaser, and that the grantee after the issuance of patent obtained no title as against the first purchaser.

The case of

Arnold vs. Grimes, 2 Iowa Reports, 1,

discloses the following facts: Arnold first entered the land in controversy under the pre-emption act of 1840 and obtained a final certificate; then Chapman, who settled upon the land about the same time, after Arnold's entry, applied for leave to contest. After considerable correspondence, and after Chapman had notified the Commis-

sioner that Arnold had conveyed the land by deed, prior to his entry, which deed in fact, however, had been obtained by Chapman himself by fraud and duress, upon Chapman's letter, the Commissioner directed an inquiry, by the Register and Receiver, and, they finding such deed to have been made, the Commissioner cancelled Arnold's entry. Subsequently Arnold went to the Court and got the obnoxious deed set aside and declared null and void, as having been executed under duress. He then applied to the department to have his entry reinstated; but in the meantime Chapman had been allowed to enter the land, and patent had been issued to him. The department at first declined to interfere, and advised Arnold to go to the courts, saying the department would not have permitted Chapman's entry if the deed had been cancelled when he made application to enter the land. But patent having already issued to Chapman, it was not thought advisable for the land department to entertain further jurisdiction of the controversy. But, however, upon a further application by Arnold, the department, to protect him, issued a second patent and cancelled Chapman's patent. Upon this state of facts the Iowa court held that the junior patent, issued upon the prior certificate, must prevail. This is all this case decides. The equities were all with Arnold; the department had done all it could to re-instate Arnold's claim, and advised the action of the courts; and the Court of equity, enforcing the equitable rights of Arnold, seems to have validated the act of the department in issuing the patent to Arnold, rather than to have sought to invalidate its former acts." The ground taken by the Court in that case was that the act in force at the time the entry of Arnold's was allowed

permitted no appeal to the Commissioner of the General Land Office from the decision of the Register and Receiver. At that time the act of Congress conferring the power of supervision on the Commissioner of the General Land Office had not been passed, and so the decision of the Court in that case may be reconciled on that ground, but we do think that, notwithstanding this, the Commissioner had the power to revise the acts of the Register and receiver to the same extent as he now has; it being remembered always that the Commissioner simply directs the officers who heard the first proof to again examine into the matter and report their opinion to him. The action of the Commissioner not being arbitrary but based upon the report which the Register and Receiver make upon the hearing.

The case of

Sillyman vs. King, 36 Iowa Reports, 207,

is the same character of decision as Cady vs. Eighmy *supra*. The Court holding that a conveyance by a purchaser of land from the United States holding a certificate of entry or location before a patent is issued will pass the title to his grantee as against a subsequent purchaser claiming under the patent.

The case of

Moyer vs. McCullough, 1 Indiana, 339,

disclosed the fact that the party under whom plaintiff claimed had located the land in dispute with a military warrant, his entry was allowed and entered of record. In transcribing from the record to the plat an error was made by the Register, by means of which the land actually entered appeared vacant. Subsequently the defend-

ant's grantor entered the land and obtained a patent. The Court was correct in its holding that the land having been previously entered was not again subject to entry, and that the issue of the certificate and patent to defendant's grantor having been inadvertently made did not vest any title in defendant. This was a case of mistake which Courts will rectify.

The case of

Aldrich vs. Aldrich, 37 Illinois Reports, 32,

is the case of a cash purchase of land, and the Court there holds that the Government has no right at its own mere discretion and without just cause to cancel its contract of purchase; but if the Government officers cancel an entry the Courts will presume, in the absence of proof, that such cancellation was upon valid grounds; but if it affirmatively appeared that such cancellation was wrongfully made the Courts will disregard it. The facts were that one Joscelyn located a military bounty land warrant upon a quarter section; subsequently the Commissioner of Pensions canceled said warrant as fraudulent, and the Commissioner of the General Land Office canceled the entry made by means of the warrant, but afterwards the order canceling the warrant was rescinded by the Commissioner of Pensions, and the Court held that inasmuch as the cancellation of the certificate of entry was based upon the action of the Commissioner of Pensions in canceling the warrant under which the entry was made, that the reinstating of the warrant was in effect a reinstatement of the entry. After this last order had been made another party entered the land, received a patent for it, and the Court held that the land not having been subject to entry

at the time the holder of the patent applied to enter it, and the rights of the party who had entered the land under the military land bounty were prior to that of the patentee, that the patentee held the patent in trust for the party having the prior right.

The case of

Morton vs. Blankenship, 5 Missouri Reports, 346,

is a case where it appeared that the plaintiff's grantor had made his entry and received a certificate from the Register and Receiver for the land in dispute. Subsequently the defendant's grantor, who had filed on another piece of land, claiming that it was not the tract on which he had intended to settle, and more than nine months after the date of his original settlement the Commissioner of the General Land Office allowed him to cancel his first filing and to make filing on the premises in controversy, and subsequently the patent was issued to him. The objection was raised that the Commissioner of the General Land Office had no authority under the law in this case to allow a change of location; the application had not been made within the time limited by law, and because another party had already located on the land and obtained a certificate therefor, and because the mistake which the law permitted to be corrected was one in the numbers of the tract and not in the intention of the claimant. Defendant's grantor had actually intended to file on the land which he had designated; his error consisted in not knowing the exact boundaries of the tract; it was not a mistake in the true numbers of the tract intended to be entered, but a mistake as to the tract itself. The Court held that the Commissioner did not have the power

which he had assumed to exercise, and we think the Court was correct. The error of the Commissioner was an error of law, and we think after the issuance of patent that the party really entitled to it has a right to invoke the aid of the Court to set aside an erroneous decision on a question of law made by the Commissioner by which his rights had been invaded.

The case of

O'Brien vs. Perry, 28 Missouri Reports, 500,

involves the same state of facts as in the case of Perry vs. O'Hanlon *supra*; the decision in the latter case involves a discussion of the same facts as in the former case, and the remarks we made at that time apply equally well here; it subsequently reached the Supreme Court of the United States: 1 Black, 132.

The case of

Cornelius vs. Kessell, 58 Wisconsin, 237,

is a case to which we have already drawn the attention of the Court in a former part of our brief. The case then under discussion being reported in the reports of the Supreme Court of the United States and the facts involved being identical in both cases. For this reason we will not stop to again discuss the same facts.

The case of

Boyce vs. Danz, 29 Michigan Reports, 146,

shows that Boyce went into possession of the premises in controversy in February 1857; that at that time the land was public land of the United States subject to pre-emption; that Boyce was qualified except that he had never become naturalized or declared his intention so to do; on

March 5, 1857, he declared his intention in due form, but in the name of Bice, which he seems to have gone by, and on this same day he filed his pre emption claim to this land. On March 31, 1857, Danz entered the same land with knowledge of Boyce's occupation and claim. On March 1, 1858, Boyce paid for the land, having previously furnished proofs to the Register and Receiver to their satisfaction of his rights as a pre-emptor, and a certificate was issued to him. October 18, 1858, the Commissioner of the General Land Office required the Register and Receiver to procure additional proofs, but this requisition was never brought to the notice of Boyce. Three years later the entry of Danz was cancelled, but subsequently the Commissioner reinstated Danz and cancelled the entry of Boyce. During all this time, however, Boyce remained in possession of the land and made valuable improvements on it. The Court in that case held that the action of the Commissioner in cancelling the entry of Boyce was a nullity because no notice of this cancellation was given to him, and that he was entitled to the land because he had complied with the law, and the decision of the Commissioner that he had not was based upon his mistaken construction of the law. In that case the aid of the Court was not invoked until the patent had issued.

The case of

Streeter vs. Ralph, 13 Nebraska Reports, 388,

was a case where the entry was canceled by the Commissioner because the record showed that a prior filing had been made in 1863 for the same land. But, thirteen years had elapsed, during which time no claim had ever

been made under said filing, and the time for proving up had expired. No settlement or improvements had been made under the first filing, and no claim had ever been made under it, but because the same appeared uncanceled of record the Commissioner of the General Land Office set aside the entry of the party, subsequently settling the same, and apparently without any notice to him. The Court held that the action of the Commissioner was wrong, in which decision we heartily concur. That case presents an entirely different state of facts from the one at bar. There was no claim made there that the man whose entry had been canceled had not complied with the law, but simply that the filing made twelve years before remained uncanceled. Of course, we know that under the homestead law the party is required to make proof within seven years from the date of settlement, and not having done so it is the duty of the Register and Receiver to cancel the filing; so that the action of the Commissioner in that case was palpably erroneous.

The case of

Baty vs. Sale, 43 Illinois Reports, 35,

was a case where Baty had settled upon a tract of land in controversy, and had filed an application for pre emption upon the same. After this the land office at which the filing had been made was discontinued, and the Commissioner of the General Land Office directed that all parties who had previously made filings should within thirty days after the new office was open renew their filings. This Baty did not do, and subsequently made final proof and received a certificate for the land; and afterwards Sale, while Baty was in possession, entered the land and re-

ceived a certificate of purchase, and a patent was issued to him. Baty's certificate was subsequently canceled after a hearing, because the land having been temporarily withdrawn by reason of the discontinuance of the land office, the Commissioner held that it was necessary to renew the filing after the new office had been opened, and this Baty not having done must be deemed to have abandoned the land. The Court holds that the discontinuance of the land office did not work a withdrawal of the land already filed upon, and that the action of the Commissioner in requiring a renewal of the application was unauthorized. That case is not a parallel one. It did not involve the question of performance of the statutory requirements by the entryman, and the matter was not litigated in the Courts until the control of the land office by the issuance of the patent had ceased. The only other case cited by counsel is the case of

Camp vs. Smith, 2 Minnesota Reports, 111,

but as we have quoted from decisions of a later date from the same Court distinguishing this case, we will not repeat what the Court there said.

The cases cited by counsel on pages 59 and 60, from the land office, with but one exception we have been unable to find, but even if they sustain the text of the brief we do not see how in this case they can be of any assistance to plaintiff in error. We have disclaimed any right on the part of the defendant in error to initiate a contest in this case, because he was not a party in interest, but was a stranger to the land, and as we before said, the land department need not have recognized him if it had chosen not to do so, but having recognized him his

actions thereafter in the matter were merely those of an informer acting for the Government and not, strictly speaking, of a party in interest. The other decisions are cited to sustain the proposition that the pre emptor has the full period of thirty months after making his declaratory statement within which to comply with the law and make final proof. Had this contest been initiated at the end of six months from the time of filing declaratory statement, and had plaintiff in error continued to reside upon, improve and cultivate the land as the law required, and a contest had been initiated and his entry contested because he had not complied with the law during the six months, we think that he would have had a right to show that he had subsequently complied with all the requirements of the law, and at the end of the thirty months would have been entitled to have made additional proof; but in this case nearly twenty-seven months had expired after plaintiff in error filed his declaratory statement before he offered to make his proof, and it was not until after thirty-one months from the time of filing the declaratory statement that the defendant in error called the attention of the Commissioner of the General Land Office to the fact that plaintiff in error had not complied with the law, so that plaintiff in error could not at that time have availed himself of the right which he insists should be allowed, because independently of a contest his right to make proof expired before defendant in error took any action whatever.

After the examination of all the authorities cited by us and those cited by counsel, and judging the decision in each case by the facts as disclosed in the decision, we do not see any difficulty as to what the decision of this

Court should be in this case. We venture to say that with the exception of the two cases decided by Judge Deady every case upon which counsel for plaintiff in error has relied can be placed in one of two groups. In the first group may be placed those where it appears that the land was offered for sale by the Government at a specified price, which price was paid and a certificate entitling the purchaser to a patent was issued. In all of these cases the Courts have uniformly held that the contract was one of bargain and sale and that the Commissioner of the General Land Office had no authority to cancel such a certificate where the land was subject to purchase. In the other group may be placed those cases where it appears that the entry was set aside without any notice to the holder of the certificate; and where it also appears that the action of the Commissioner of the General Land Office was based upon a mistake of fact or upon a false construction of the acts of Congress. In such cases the fundimental principle of our Government that every citizen has a right to be heard in any matter affecting his interest, and that he is not concluded by any adjudications of his rights in any proceeding to which he was not a party, and in which he had no opportunity to be heard; but in such cases while Courts will, upon proof that no notice was given, examine into the question to ascertain whether the action of the Commissioner was warranted by the facts or by the law, still in no case cited by counsel for plaintiff in error, with the notable exception of Judge Deady's cases, and in none which we have cited, have the Courts acted until after the issuance of a patent from the Government; not even in cases where the land had been purchased; but without exception the patent

had issued before the intervention of the Courts was sought. Now it is a somewhat remarkable circumstance that during all the years since the first pre emption act was passed and during which years actions have been brought in nearly every State for the purpose of annulling the acts of the land department that in no case has this attempted to be done until after a patent had issued to one of the parties claiming it. Counsel have made a very ingenious arguement as to the hardships to which the holder of a certificate is subject by the action of the land department in a case of this character. While in many cases this plea might be entitled to some weight it is in the case at bar peculiarly out of place, and we are surprised that counsel should attempt to make suggestions as to possible hardships, when the facts as found by the officers of the land department exhibit the most glaring and brazen attempt on the part of the plaintiff in error to procure title to land when he had never complied or attempted to comply with the law under which he claims the right to hold this land. But we notice that counsel are very careful to qualifiy their remarks and that they do not attempt to say pointedly that their client has been injured in any respect. Thus, on page 60 of their brief, they say, "And if all contestants be required to appear at some time within the period thus fixed he would be able, if he were honest and if he has really complied with the law, to establish the facts before the Register and Receiver," and we might add, that if he were honest and if he had really complied with the law that it would be possible for him at any time to prove these facts. And again on pages 60 and 61: "It is evident that a contest at the time of making final proof

does not therefore work any hardship to the settler, for if he is honest and if he has complied with the law he can ordinarily establish the necessary facts to secure his rights, and it is clearly the intention and spirit of the land laws of the United States to confer a benefit upon the *bona fide* settler, and the punishment and penalties provided for by these laws are all aimed at dishonesty, fraud and perjury." Is it a hardship upon a man who has never complied with the law and who is attempting to obtain that to which he has no right to make him appear at any time and subject him to an examination as to the manner in which he has attempted to defraud the Government? If it is then every rogue may well plead the hardships which a just law imposes upon him. Again counsel say: "It cannot be claimed upon the records of the case at bar that any charge of making false statements in his final proof either by himself or his witnesses has ever been made against Pierce, or sustained by the department." This is what the Commissioner of the General Land Office said upon the appeal to him by plaintiff in error: "The conclusion is irrestible that Pierce has failed to comply with the legal requirements as to valid settlement, *bona fide* residence or substantial improvements; there is a palpable attempt to acquire the land by doing, not as much, but as little as possible, from the time he initiated his claim, and every subsequent act to the time of making proof and the allowance of entry after which he immediately vacated it and took up another government tract, under the guise of the homestead entry, but as quickly as possible secured patent therefor by converting it into a cash entry. There is a conspicuous absence of that good faith contemplated by

law, and I, therefore, see no reason for disturbing your decision." As we have before remarked, fraud is a question which is determined by the facts. It is a conclusion of law. When the officers of the land department found that plaintiff in error had not complied with the law, they must of necessity have found that his former proof making it appear that he had complied with the law was fraudulent or that his former proof did not of itself entitle him to the certificate. On page 62 counsel concedes the right of the Government through its agents and the right of a third party to appear at the time the pre-emptor is making his proof and break down the proof, or by the production of other witnesses to defeat him. When counsel has conceded this, we think he has conceded his entire case, for by virtue of the power of supervision lodged in the Commissioner the plaintiff in error had never completed his proof. The mere issuance of the certificate was in effect nothing more or less than an assurance by the Register and Reciver to plaintiff in error that "in case your proof is found sufficient by the Commissioner of the General Land Office this certificate will entitle you to a patent from him," and as we have before remarked, the fact that the law does not authorize the issuance of a certificate, and that the patent is the only instrument which is recognized by the statutes shows conclusively that nothing but the patent itself should be evidence of the right of a claimant to the public lands. Counsel are in a anomolous position: They claim that the issuance of the certificate by the Register and Receiver to plaintiff in error divested said officers and the entire land department of any further authority in the matter. This because the proceeding by which the cer-

tificate of plaintiff in error was canceled was not authorized by any law of the United States, and yet they have failed to point to one single section or provision of the Revised Statutes which authorizes the issuance of that very certificate which they claim is paramount. If the Register and Receiver assumed to issue that which the statutes did not authorize or recognize it must have been by virtue of some regulation of the department, and if a regulation of the department or if issued without authority of law, then it was within the power of the Commissioner to cancel it, because it had no validity at law. But if counsel concede the power of the Register and Receiver to issue the certificate it must be because the Secretary of the Interior, by virtue of Section 2,263, which directs "proof to be made to the satisfaction of the Register and Receiver agreeably to such rules as may be prescribed by the Secretary of the Interior," and the further provision, Section 453, giving the Commissioner of the General Land Office authority "to perform all executive duties pertaining to the sale of public lands or in any wise respecting them and for the issuing of patents for all grants of land under the authority of the Government," and the further provision, Section 2,478, that "the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution by appropriate regulations every part of the provisions of this title not otherwise provided for," authorized the issuance of such a certificate, and if he had power to authorize the issuance of a certificate, then certainly he had the power to declare that this certificate might be canceled in case it was improperly or inadvertly issued. It seems to us that the

logic of this statement is incontrovertible. The contention of counsel that notwithstanding the fact that the officers of the land department may know that a so-called entryman has not complied with the law under which he holds a certificate they must nevertheless issue to him a patent, seems to us a most remarkable one. The claim that is made that the proceeding before the Register and Receiver at which plaintiff in error's certificate was held for cancellation was not authorized by the statutes or even by the rules of the department, and that therefore the testimony of witnesses taken in opposition to the proof made by plaintiff in error could not be attacked because of perjury and the witnesses themselves subjected to criminal prosecution is one to which we have before adverted, but we are satisfied that before closing this brief we should call the attention of the Court to some of the provisions of the Revised Statutes.

Section 2,246 provides:

"The Register or Receiver is authorized, and it shall be their duty to administer any oath required by law or the instructions of the General Land Office, in connection with the entry or purchase of any tract of the public lands."

Section 2,478 provides:

"The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for."

Section 5,392 provides:

"Every person who, having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposi-

tion or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment at hard labor not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any Court of the United States until such time as the judgment against him is reversed."

The question now is, was the oath administered to witnesses at that time required by law or instructions of the General Land office in connection with the entry or purchase of any tract of the public lands? Keeping in mind the power of supervision lodged with the Commissioner and his authority to return the proof for the purpose of requiring addition l testimony or the re-examination of the claimant and his witesses and the right of any person to appear on behalf of the Government and interpose objections and testimony in opposition of that of the claimant, we think it evident that a false oath made by any person, whether on behalf of the claimant or in opposition to him, would be perjury within the meaning of the Revised Statutes. There is no provision in the rules of practice in a case of contest even for the administration of an oath, so if counsel's contention is correct that a contest by a party in interest should have been initiated, plaintiff in error would not have been protected from the admission of false testimony.

This question of jurisdiction is in a measure raised by our demurrer to plaintiff in error's reply, but the real ground of the demurrer in the Court below was that the reply did not state facts sufficient to constitute a defense. The plaintiff in error admits that the Register and Receiver, Commissioner of the General Land Office, and the

Secretary of the Interior found that he had at no time established his residence upon the land embraced in his said cash entry. This was a finding of fact. It was the point in controversy before the land department and the finding of the officers of that department that he had not established his residence upon the land determined the question as to whether he had complied with the law. Of course if counsel concede that the land department had jurisdiction to make this finding then it results that the finding is exclusive on the Court, unless impeached for fraud. Now, no allegation is made, nor is there a suggestion of fraud, either on the part of defendant in error, or on the part of the officers of the land department. We assumed in the Court below that the land department had exclusive jurisdiction of this matter and that its finding was conclusive on the Court and for that reason there having been no allegation of fraud on the part of defendant in error in procuring the cancellation of the certificate of the plaintiff in error or of fraud on the part of the officers of the land department in canceling the entry that the reply did dot state facts sufficient to constitute a defense. Many of the authorities we have cited sustain this view, and we have not thought it necessary to make any argument on this point because of the well established principle that a finding of fact by a Court having jurisdiction of the subject-matter and of the parties is conclusive on the same parties in whatever Court the same question may again be litigated. We cite simply, as bearing directly upon the proposition first announced:

Plummer vs. Brown, 12 Pacific Reporter, 464, and cases therein cited.

Vance vs. Burbank, 101 United States Reports, 514.

Baldwin vs. Stark, 107 United States Reports, 463,

Johnson vs. Towsly, 13 Wallace Reports, 72,

Steel vs. Smelting Co., 106 United States Reports, 447,

And in conclusion we feel that we cannot do better than to close our brief with a quotation from the case of

Vantongeren vs. Heffernan, 38 Northwestern, Reporter, 52 to 79.

In that case plaintiff filed upon and received a certificate of purchase for the northwest quarter of a certain section, and defendant's grantor had filed upon and obtained a certificate for the southwest quarter of the same section, according to a survey made in the year 1865, but in 1882, and after the certificates had been issued to the respective parties, the Government caused a new survey to be made by which the south half of the northwest quarter became the north half of the southwest quarter, thus giving the defendant eighty acres which had previously been included in the lines of plaintiff's certificate, and on his eighty acres were the improvements of the plaintiff. No patent had issued to either party. The plaintiff sued to quiet his title to the eighty acres, which by the new survey had been removed within defendant's lines. The Court held first, that under the statutes of Dakota that an action to quiet title would not lie; and in addition to that reviewed the decisions of the Supreme Court of the United States and all the States, showing that the Court had no jurisdiction to decide the respective claims of parties whose rights had been adjudicated by the land department until after the issuance of patent. After coming to the same conclusion as did the authorities reviewed, and to that

which we have urged here, the opinion closes with this passage:

"The power of supervision, given the Secretary and Commissioner, is a general one,—a supervision over all the acts of the Register and Receiver. There is no exception made in the matter of issuing of final certificates; and if the position here contended for be the correct one, to-wit, that the Commissioner must issue a patent at once upon the presentation of the certificate, and that the issue of the certificate concludes all inquiry into all matters settled by its issue, then it concludes all supervision by the superior officers; and on that reasoning the patent might as well issue by the local as by the supervisory officers. We are led to adopt the contrary of this reasoning. In our judgment, the Secretary of the Interior, and, under his direction, the Commissioner of the General Land Office is charged with the supervision of the public lands for the very purpose of preventing frauds, mistakes and errors in the disposition of such lands by the local officers; and when such officers have committed errors or mistakes, or have been imposed upon by fraud, the entire case may be re-examined upon appeal, or so far supervised, in the usual course of transmission through the department, as to expose and correct such errors or frauds, to the end that the patent may issue to the pre emptor honestly entitled to it under the law. Any other rule would make the 'right of pre-emption, arising between different settlers,' to be determined by the Courts, instead of by the Register and Receiver, as provided by the statute, in a large class of pre-emption cases. It is no answer to say that fraud is a question for the Courts; that its determination is judicial in character, and that such power cannot be exercised by the executive department. The determination of 'the right of pre-emption arising between different settlers,' and the weighing and considering of testimony as to settlement, improvements, etc., upon which such right depends, is essentially judicial in character; yet no one doubts the right of Congress to confer such powers upon a branch of the executive department. No private rights intervene so long as the title, legal and equitable, remains in the Government, or while such title may be held as derived from the Government through fraud or mistake;

and the department in these cases only passes upon the questions of fraud or mistake so far as to determine whether it, the department, will re-examine or re-open the case already determined. It does not seek to adjudicate upon the fraud or mistake, alleged as such between private parties. The case made is a *prima facie* one in practice,—a petition for a review of the former decision, upon *exparte* showing of fraud or mistake as against the Government; and while the case is pending in the department, and before patent issues, the Secretary and under his direction, the Commissioner, ought to have, and in our fudgment they clearly have, such power of re-examination and re-adjudication in a proper way, under the pre-emption act of 1841 and the amendments thereto. We are clearly of the opinion that the supervisory and appellate powers vested in the Secretary of the Interior, and the Commissioner of the General Land Office, under his direction, give them the right to examinie all acts of the Register and Receiver. In matters of fact left to the determination of the local officers, the jurisdiction of the Secretary and Commissioner may be exercised by appeal, and a re-examination of the facts themselves, or by examination of their action, and requiring them again to examine the questions of fact involved ; and in all cases they may supervise the purely administrative or executive acts of the local officers. We are led, then, to the conclusion that, prior to the issue of the patent, the plaintiff cannot maintain this action. This Court cannot know but that the department may issue to him, instead of to the defendant, a patent for the premises in controversy; and if his claim is just and right (a question upon which this Court does not pass), the law presumes he will obtain a patent, upon the ground that all officers are presumed to act justly and to do their duty."

Upon the proposition that the Commissioner of the General Land Office has power to cancel a pre-emption entry, we cite the following additional authorities:

Steigart vs. Walker, 30 Pacific R., p. 162.

Fernald vs. Winch, 31 Pacific R., p. 665.

United States vs. Steenerson, 50 Federal R., p. 504.

The cases of Smith vs Ewing 23 Fed.R 741 and Wilson vs Fine 40 Fed.R 52 have been repudiated and overruled by the Court in which they were decided.
American Mortgage Co.vs Hopper 50 Fed.R 67.

Am. Mortgage Co. vs. Hopper, 64 F.R. 1, 553

Knight vs. United Land Association, Supreme Court Reports, Vol. 12, p. 258.

Lancaster

Attorneys for Defendant in Error.

JOHN P. JUDSON and
W. C. SHARPSTEIN,
of Counsel for Defendant in Error.